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IN THE

Supreme Court of the United States

October Term, 1963

No. 253

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,

Petitioner,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, the relator-appellant-appellee below, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled habeas corpus proceeding on April 9, 1963.

Opinions Below

The opinion of United States District Judge Cashin for the Southern District of New York is reported at 203 F. Supp. 389. An earlier decision of United States District Judge Levet of that same Court in a related aspect of this proceeding is reported at 198 F. Supp. 40. The opinion of Circuit Judge Waterman of the United States Court of Appeals for the Second Circuit, which affirmed in part and reversed in part the determination of Judge Cashin, is reported at 315 F. 2d 673.

Jurisdictional Statement

The order of the Court of Appeals herein is dated April 9, 1963.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

Questions Presented

Petitioner is a native-born American who has never renounced his American citizenship [*cf.* § 349[1] (a) (6), (7)], never taken an oath of allegiance to a foreign state [*cf.* § 349(a)(2)], and never acquired the citizenship or nationality of another state [*cf.* § 349(a)(1)]. Nor is it charged that he ever voted in a foreign election [*cf.* § 349 (a)(5)], or served in the employ of a foreign state of which he was a national [*cf.* § 349(a)(4)]. It was held below, however, that petitioner forfeited his American citizenship, rendering him stateless and deportable from the United States, because he was "a member of the Armed Forces of Cuba from January 2nd, 1959, to May, 1960", a charge presumably based upon the statutory provision that citizenship is lost by "entering, or serving in, the armed forces of a foreign state" without the written authorization of the Secretaries of State and Defense[2] [§ 349(a)(3)].

The issues raised in this first instance of review by this Court of an adjudication of denationalization, statelessness, and deportability of an American-born are the following:

1. Whether § 349(a)(3), as here applied, is a penal statute and therefore unconstitutional because it imposes

[1] Sections 241, 242 and 349 of the Immigration and Nationality Act of 1952 are fully set forth at pages 4-7 and are hereinafter referred to as "§ 241", "§ 242", and "§ 349" respectively.

[2] While § 349(a)(3) refers to entry or service in the armed forces of a foreign state, the charge here is membership in the Cuban Armed Forces.

the cruel and inhuman punishment of statelessness prohibited by the Eighth Amendment (*Trop* v. *Dulles*, 356 U. S. 86) and because it imposes such punishment without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments (*Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144).

2. Whether § 349(a)(3), as here applied, is an unconstitutional impairment of the petitioner's status as a citizen of the United States pursuant to Amendment XIV, § 1, in that he has never renounced his sole American citizenship by declaration or act.

3. Whether the administrative arrest and administrative detention of the petitioner by the respondent for a period of approximately nine months in connection with petitioner's possible deportation is an improper and unconstitutional exercise of the judicial power which is vested solely in the judiciary pursuant to Article III.

4. Whether petitioner's service in the Cuban Rebel Army from January 2, 1959 to May, 1960, which initiated pursuant to the order and directive of a powerful Cuban authority and continued subject to punishment for desertion or counter-revolutionary activity, was voluntary within the meaning of *Nishikawa* v. *Dulles*, 356 U. S. 129.

5. Whether the petitioner's service in the Cuban Rebel Army after January 2, 1959, during a period when that organization was not designated as an "armed force", and was neither engaged in nor preparing for military activities, but was explicitly assigned to and carrying out a "civic and not [a] * * * military calling", constituted service in the armed forces of a foreign state within the meaning of § 349(a)(3).

6. Whether petitioner, if he is an alien, is deportable as an excludable alien because when he returned to this

country in July, 1960, and before his alienage had been competently determined or established, he did not obtain the entry documents required of an alien.

7. Whether petitioner, if he is an alien, is deportable as an excludable alien, pursuant to the statutory provision which renders excludable aliens convicted of crimes involving moral turpitude, because the petitioner had been convicted of such a crime in 1952 while he was a citizen.

Applicable Constitutional and Statutory Provisions

1. United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

2. Immigration and Nationality Act § 349(a)(3), Act of June 27, 1952, c. 477, Title III, Ch. 3, § 349(a)(3), 66 Stat. 267, 8 U. S. C. A. 1481(2)(3) (referred to herein as "§ 349(a)(3)"):

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense."

3. Immigration & Nationality Act § 241(a)(1), Act of June 27, 1952, c. 477, Title II, Ch. 5, § 241(a)(1), 66 Stat. 204, 8 U. S. C. A. 1251(a)(1) (referred to herein as "§ 241(a)(1)"):

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

4. Immigration & Nationality Act § 212(a)(9), (20), Act of June 27, 1952, c. 477, Title II, Ch. 2, § 212(a)(9), (20), 66 Stat. 182, 8 U. S. C. A. 1182(a)(9), (20) (referred to herein as "§ 212(a)(9)" and "§ 212(a)(20)"):

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(9) Aliens who have been convicted of a crime involving moral turpitude"

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(c) of this title;"

5. Immigration & Nationality Act § 242, Act of June 27, 1952, c. 477, Title II, Ch. 5, § 242, 66 Stat. 208, 8 U. S. C. A. 1252 (referred to herein as "§ 242"):

"(a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole".

"(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present.

No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other

law or treaty, the decision of the Attorney General shall be final."

"(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section."

Statement of the Case

There have been many controverted issues of fact in this proceeding. Petitioner's view of the controverted aspects of the record is reserved for the argument which follows. At this point the facts not contradicted in the record are summarized:

Marks was born in Milwaukee, Wisconsin, on August 1, 1921 (App. 119a). In 1958 he went to Cuba (App. 141a). The Cuban civil war was in progress at that time. Marks ultimately joined the rebel forces led by Castro and attained the rank of captain in the Rebel Army (App. 145a). Although eligible to do so as a result of his service in the Rebel Army (App. 263a-267a), Marks never acquired Cuban nationality (App. 119a, 120a, 140a) or otherwise renounced his American citizenship, and promptly protested notice that his American citizenship was in question because

of his service in the Rebel Army (App. 127a-128a, 282a-284a).

Sometime in November, 1958, Marks was obliged to obtain medical treatment for injuries he sustained, and it was necessary for him to go to Florida for that purpose (App. 148a-150a). Marks returned to Cuba during the first week of January, 1959 (App. 150a); in the interim, the rebel forces had occupied Havana, Batista had fled, and the hostilities had ended.

Upon his return to Cuba, Marks was directly assigned by Che Guevara, one of the leading revolutionaries in the rebel forces, to perform security duties at La Cabana, a prison in Havana (App. 152a-155a). Thereafter, starting in June, 1959, Marks served in various other assignments in his capacity as a captain in the Rebel Army, but his duties and authority were diminished as he increasingly engaged in anti-communist activity (App. 122a-126a). That activity finally reached such proportions that by May, 1960, Marks, fearing his imminent arrest as a counter-revolutionary by the Cuban secret police, escaped from Cuba and ultimately arrived in the United States in July, 1960 (App. 132a-134a).

On January 25, 1961, Marks was interviewed by two investigators of the Immigration and Naturalization Service at his apartment. According to Marks, they stated they were interested in information and cooperation which might "help them in dealing with the Cuban situation" (App. 135a). Marks was brought to the offices of the Service that night where, after approximately five hours of interrogation (App. 67a-70a), he signed a sworn statement dealing with his alleged activities in Cuba (App. 59a-61a). The statement was drafted in the handwriting and language of one of the investigators (App. 241a-246a), and was signed at 2:00 A. M. on January 26 (App. 67a). Immediately following the signing of the statement, Marks was

told, for the first time, that he was under arrest, presumably as a deportable alien (App. 73a, 78a, 138a). Marks was thereupon removed to the maximum security section of the Federal Detention Headquarters; he was already in such detention when he was served, at 7:10 P. M. on January 26, with an administrative warrant of arrest (App. 66a-67a) issued by the Attorney General or his representative [see § 242(a)].

On January 26, 1961 charges were served on Marks by the Service for the institution of deportation proceedings under § 242. The charges stated that pursuant to § 349(a)(3), Marks was not a citizen or national of the United States because he was a "member of the armed forces of Cuba from January 2, 1959 to May 1960"; the charges concluded that Marks was an excludable and, therefore, deportable alien [see § 241(a)(1)] on the ground that he had been convicted on January 11, 1952 for the commission of a crime involving moral turpitude [see § 212(a)(9)], and on the further ground that, at the time he re-entered the United States from Cuba on July 22, 1960, he did not have the entry papers required of an alien [see § 212(a)(20)] (App. 17a-21a).

Hearings on the described charges were commenced before a Special Inquiry Officer of the Service on January 26, 1961, and several further hearings were held before him up to April 6, 1961. During those hearings, by letter dated March 16, 1961, counsel for Marks requested of the Attorney General of the United States that Marks be released on bail or parole pending the proceedings so that the relator could participate in the preparation and presentation of his defense (App. 21a-23a). This request was denied by the Attorney General by letter dated March 27, 1961 (App. 23a-24a).

On May 31, 1961, almost two months after the conclusion of the hearings before the Special Inquiry Officer, that Officer sustained the charge that Marks was a de-

portable alien (App. 7a). Marks, still in custody, thereupon appealed to the Board of Immigration Appeals, which, on August 2, 1961, dismissed the appeal and sustained the decision of the Special Inquiry Officer (App. 7a).

Before the decision of the Board, Marks instituted a habeas corpus proceeding to obtain his release from the maximum security detention in which he was being held. The writ was denied by Judge Levet, who found that Marks was first obliged to exhaust his administrative remedies before a writ could issue, and bail was denied (198 F. Supp. 40).

The instant habeas corpus proceeding, brought pursuant to 28 U. S. C. A. 2241(c)(3), was commenced by order to show cause dated August 21, 1961 (App. 3a-4a). The petition alleged that Marks is not an alien or deportable and that his detention is illegal on constitutional, statutory and factual grounds (App. 5a-13a). By stipulation of counsel the proof on the issues raised in the habeas corpus proceeding was to consist of the testimony which was adduced at the hearing before the Special Inquiry Officer, subject, however, to all objections made at that hearing and to the rulings of the Court upon those objections (App. 30a-32a).

In the instant habeas corpus proceeding, the petitioner renewed his application for bail. Judge Cashin fixed bail at $10,000 (App. 33a-36a), and later reduced the bail to the sum of $5,000. On October 18, 1961 the petitioner was released under the prescribed bond. Until his release, Marks had been continuously detained for almost nine months in maximum security at the New York Federal Detention Headquarters since the inception of the administration proceeding on January 26, 1961, although he has been charged with no crime or criminal activity, and

although, following the ruling of the Board of Immigration Appeals, a Justice Department "spokesman" publicly "expressed doubt * * * that Marks would be deported, because of the difficulty of finding a country that would accept him" (App. 24a-25a).

On March 29, 1962 Judge Cashin granted the writ, finding that the "proposed continued detention of the relator is * * * unlawful" for the reason that while the petitioner, according to the District Court, had lost his native-born American citizenship, no valid ground for deportation had been shown (203 F. Supp. at p. 317). The District Court considered that the petitioner was not excludable as an alien, and therefore not deportable, for failure to procure, at the time of his entry to the United States in July, 1960, entry documents required of aliens since there had been no competent judicial determination of petitioner's alienage prior to July, 1960; similarly, the District Court held that petitioner's conviction in 1952, at a time when he was a citizen, did not render him excludable or deportable in his status as an alien.

Following this determination by the District Court, and to the present time, the petitioner's bail has been reduced to $1,000 and he has been released on such bail pursuant to stipulation and order as prescribed by Rule 49(3), Rules of the United States Supreme Court.

On April 9, 1963, the Second Circuit, in an opinion written by Judge Waterman, held that "[a]lthough we find great force in the constitutional arguments presented by relator's counsel, we are constrained by the superior authority of *Perez* v. *Brownell*, 365 U. S. 44 * * * (1948), to affirm the determination of alienage" (315 F. 2d, at p. 675). In addition, the Court of Appeals concluded that the denationalizing effect of petitioner's service in the Cuban rebel forces was immediately contemporaneous with such service so as to establish his alienage prior to his entry to the

United States in July, 1960, and his failure to obtain documents required of entering alien immigrants caused the petitioner to be deportable as an excludable alien.[3] Accordingly, the Circuit Court reversed and dismissed the writ.

REASONS FOR GRANTING THE WRIT

I

§ 349 (a) (3), as here applied, imposes cruel and inhuman punishment without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments. The ruling below sustaining the constitutionality of § 349 (a) (3) as so applied is in conflict with applicable decisions of this Court.

Expatriating legislation resulting in statelessness has never been sustained by this Court. In *Trop* v. *Dulles*, 356 U. S. 86, expatriation pursuant to § 349(a)(8) for desertion in time of war was held the imposition of an unconstitutional penalty, four members of the majority of the Court holding that the resultant statelessness amounted to cruel and inhuman punishment. And in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, where expatriation pursuant to § 349(a)(10) for draft evasion caused a condition of statelessness, the statute was held unconstitutional as the imposition of punishment without compliance with the procedural requirements set by the Fifth and Sixth Amendments for the conduct of criminal prosecutions. Accord-

[3] The Court of Appeals explicitly refrained from reaching or deciding the question whether Marks was also excludable and deportable on the grounds of his conviction for a crime involving moral turpitude. Because of petitioner's release on bail, the Court of Appeals also explicitly reserved decision on the question whether petitioner's detention, based solely on his prospective deportation [§ 242(a)], was unlawful in that no country would accept him as a deportee and he was in fact not deportable.

ingly, if § 349(a)(3), as here applied, is penal in nature and leaves the objects of its application stateless, it is unconstitutional, whether for the cruelty and inhumaneness of the "drastic, the truly terrifying" penalty of statelessness (Brennan, J., concurring in *Mendoza-Martinez*, *supra*, at p. 187) or because of the absence of a "prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses" (*Mendoza-Martinez*, *supra*, at p. 167). It is, therefore, decisive that, as we shall show, § 349(a)(3) is penal in purpose and application.

§ 349(a)(3) does not merely expatriate, it also creates statelessness. Prior to 1940 service in the armed forces of a foreign state was not by itself expatriating; from 1940 to 1952 such service in a foreign state caused loss of American citizenship if the soldier was a national of that state, thereby presumably leaving him with his other nationality intact; only since the enactment of § 349(a)(3) in its present form in 1952 can a person of sole American citizenship be caused to lose that sole citizenship by foreign military service (see pp. 15-18, *infra*). § 349(a)(3) does, therefore, result in statelessness in its application, and such is its uncontradicted effect upon the petitioner (App. 5a); the District Court correctly observed that as a result of the impact of § 349(a)(3) upon the petitioner, "he is a stateless alien" (203 F. Supp., at p. 397).

In addition to imposing a condition of statelessness, § 349(a)(3), in its application to petitioner, has other consequences associated with penal legislation. § 349(a)(3), in conjunction with the laws governing exclusion and deportation of excludable aliens [§§ 212, 241 and 242], provides the alleged authorization for the administrative arrest and approximately nine months detention of the petitioner described at pages 8-11, *supra*. The validity of this procedure is challenged at a later point in this brief. But

the process of arrest and imprisonment in the enforcement of the denationalizing effect of § 349(a)(3) is here material to the understanding of that statute's operative aspects as a penal statute.

The administrative arrest and imprisonment of Marks was for the duration of the administrative proceeding on the issue of his deportability,—a detention period which included almost two months after the conclusion of hearings for the Service hearing officer to render a decision and another four months for determination by the Board of Immigration Appeals. The petitioner's request to the United States Attorney General for release was denied (App. 21a-23a), and release by habeas corpus was likewise denied pending exhaustion of administrative remedies (198 F. Supp. 40). And, as matters now stand, if the ruling below is sustained, "the Attorney General shall have a period of six months" from the final order of this Court "within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained", and "[i]f deportation has not been practicable, advisable, or possible * * * within such six-month period the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section" [§ 242(c)].

§ 349(a)(3), as here applied, therefore exposes the petitioner to an unlimited period of "detention pending eventual deportation", particularly as it has been alleged and not denied that Marks cannot be deported to Cuba and no other nation will accept him as a deportee (App. 10a-11a); the proof discloses that a Justice Department representative publicly "expressed doubt * * * that Marks would be deported" (App. 25a). If it should prove that some nation will accept the petitioner as a deportee, and he is deported as an excludable and, therefore, deportable alien, Marks

will have been banished into exile from this country forever.

Expatriation, statelessness, arrest, almost unlimited "further supervision and detention", and banishment are the substance of penal rather than regulatory legislation. The penal consequences flowing from the application of § 349(a)(3) are no incidental by-product of a non-penal regulatory purpose or pattern. For the legislative history of § 349(a)(3) discloses that the underlying and exclusive legislative purpose in the case of persons of sole American citizenship was to exact loss of that American citizenship as a mode of retribution; Americans who serve in a foreign military force,—except where authorized to do so by the Secretaries of States and Defense,—are deemed by the Congress to have demonstrated a lack of allegiance to the United States and unworthy of retaining American citizenship. We shall show that legislation so purposed and structured is invalid for various reasons; here we emphasize the retributive and, therefore, penal objective of a statute which represents an effort by Congress to wrest American citizenship from those the Congress believed to have repudiated American allegiance by service in the armed forces of a foreign state.

Prior to 1940 such service was no cause for loss of citizenship (see pp. 24-25, *infra*). In 1933 President Roosevelt, at congressional request (86 Cong. Rec. 11943), established a cabinet committee composed of the Attorney General and the Secretaries of State and Labor to revise and codify the nationality law. The cabinet committee report, following 5 years of study, proposed, *inter alia*, various new grounds for denationalization. These new provisions were stated to be

> "* * * merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United

States." (H. R. Comm. Print. Pt. 1, 76th Cong., 1st Sess., p. VII.)

The nationality code proffered by the cabinet committee included loss of citizenship for entering or serving in the armed forces of a foreign state (*Id.*, at pp. 66-67). It was contemplated that one who

> "* * * voluntarily enters, or continues to serve in, the army of a foreign state, thus offering his all in support of such a state, should be deemed to have transferred his allegiance to it." (*id.*, at p. 67.)

In 1940 congressional hearings were conducted on the report and proposed code. Mr. Flournoy, Assistant Legal Adviser of the State Department, testifying in support of the above proposal, said that

> "* * * it does not seem reasonable that a person should give himself up and risk his life for the good of a foreign state and remain a citizen of the United States, although it may be reasonable to provide for recovering citizenship readily in such cases." (Hearings on H. R. 6127, 76th Cong., 1st Sess., p. 131.)

H. R. 9980, 76th Cong., 1st Sess., incorporated the proposed nationality code, with changes not here material. The bill was briefly debated and passed in the House in September, 1940. (86 Cong. Rec. 11965.) The Senate Committeee on Immigration, however, rejected the Houses's formulation of denationalization for service in the armed forces of a foreign state, and confined such denationalization to the dual-national who serves in the army of a country of which he is a citizen. (Sen. Report No. 2150, 76th Cong., 1st Sess., p. 3.) The Senate revision had the effect of shifting the congressional purpose from coping with the problem of loss of allegiance to the problem created by the "conflict between the two nations over the military service of the dual-national." (Pp. 38-39, United

States Brief in *Perez* v. *Brownell*, 356 U. S. 44.) Ultimately, the bill passed as amended by the Senate (86 Cong. Rec. 12817-8, 13250) and became the Nationality Act of 1940 (54 Stat. 1137), the military service denationalization provision being § 401(c) thereof (54 Stat. 1168-9).

In 1950 the Senate Judiciary Committee, of which Sen. McCarran was chairman, proposed that denationalization for service in a foreign army not be conditioned upon dual-nationality or any other factor. (Sen. Report No. 1515, 81st Cong., 2nd Sess., p. 749.) It was pointed out that under the Nationality Act of 1940 denationalization for foreign military service occurred only when the soldier was a citizen of that foreign country or where that foreign country required an oath of allegiance as a condition to military service. This was considered to be an undesirable lack of uniformity.

> "The subcommittee feels that the provisions covering the loss of nationality through service in the armed forces of a foreign country should be uniform and should not be dependent upon foreign law, and therefore is recommending changes in this subsection designed to effect such uniformity." (*id.*, at p. 749.)

By 1952 the same Senate committee under the same chairman proposed the bill which eventuated in the present § 349(a)(3) as part of the Immigration and Nationality Act of 1952. (Sen. Report No. 1137, 82nd Cong., 2nd Sess., p. 46.) There does not appear to have been any congressional discussions or debate as to the effect of statelessness resulting from the extension of foreign military service denationalization from dual-nationals to persons of sole American citizenship. (See, *e.g.*, 2 U. S. Code Cong. & Admin. News (1952), p. 1742.) In 1952, then, Congress finally enacted in § 349(a)(3) the provision recommended 14 years earlier by the cabinet committee. In doing so,

Congress indicated that it intended to equate those who did not with those who did take an oath of allegiance upon entering a foreign army. (Sen. Report No. 1515, 81st Cong., 2nd Sess., p. 749.) Congress thereby adopted the reasons which motivated the earlier recommendation, *i.e.*, denationalization of those who repudiate American allegiance. (See Note, 54 Columbia Law Rev. 932, 942.)

The legislative history of § 349(a)(3) evidences no purpose other than that of retribution in the statute's application to persons of sole American nationality. While the Congress was anxious to free the United States from the problems arising where an American national of dual-nationality asks for United States intervention to avoid foreign military service in the other country of which he is a national and a resident (see Tsiang, Expatriation in America Prior to 1907, p. 99), there is no indication in that legislative history that the Congress, in enacting § 349(a)(3), was concerned with such problems in cases involving single rather than dual nationality.[4] The American with sole American citizenship in a foreign army has either been impressed into such service against his will or has joined of his own will; in the former case Congress did not intend to foreclose American intervention and in the latter Congress did not expect American intervention for the avoidance of service to be invoked. As appears from the

[4] The object of the original statute, § 401(c) of the Act of 1940, in denationalizing, only one who was a national of the foreign state in whose army he was serving, was, as indicated, to avoid conflicting claims of sovereignty over an American national who had been conscripted, over his objections, into the army of his alternate nationality and had invoked the protection of the American authorities. Curiously enough, in such a case the service would be considered involuntary under *Nishikawa* v. *Dulles*, 340 U. S. 129, so that in the one instance involving problems in the conduct of our foreign affairs which the Congress had in mind in enacting legislation to denationalize for service in a foreign army, denationalization is now not effected.

review of the legislative history of § 349(a)(3), individual allegiance and not the conduct of foreign affairs is what preoccupied the Congress in formulating § 349(a)(3) so far as it applied to those of sole American citizenship.

The District Court, relying heavily upon *Perez*, found the legislative purpose in § 349(a)(3) to be the avoidance of international political embarrassment said to be potentially occasioned the United States by individual Americans serving in foreign armies. Whatever the validity of such a finding of legislative intent in *Perez*,—a case which did not involve statelessness and therefore did not confront the issue whether the statute was penal in nature,—there is here no foundation for a like finding. For § 349(a)(3) is not confined to "embarrassing" service in the military of an enemy or unfriendly nation, but would, as here applied, automatically denationalize even for "non-embarrassing" service in the army of an ally if such service has not been explicitly authorized by the Secretary of State and the Secretary of Defense.

The legislative history of § 349(a)(3) does not contain the slightest suggestion of congressional concern that the act of an American individual would, to our embarrassment, be attributed to the entire nation or construed as national policy. If the problem had occurred to the Congress, no doubt techniques much simpler, more effective, and less destructive of individual rights than the imposition of statelessness could have been suggested to demonstrate the independence of the nation from the acts of a private individual (see *Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 185). And, if cognizant of the problem, the Congress nevertheless insisted upon utilizing the device of statelessness and potential banishment, the penal purpose of the Congress would be established since such a device would be "excessive in relation to the [allegedly non-penal] * * * purpose assigned" (*Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 169).

It is, in the end, unthinkable that the Congress intended, or is empowered, to "disown" an American citizen in order to evidence American disclaimer of responsibility for his politically distasteful action. With the possible exception of *Perez*, there is no precedent for such a mode of expressing American policy. If the technique may be fairly considered as the intention and within the constitutional powers of the Congress, we can see no discernible limit to its application; all manner of individual conduct "embarrassing" to this country in its international political relations, from racial discrimination against representatives of foreign countries to unfair competitive business practices abroad, would thereby be cause to denationalize native-born Americans. The unlimited scope of logical extensions of the doctrine of regulation by denationalization militates against imputing to the Congress any intent to initiate such a doctrine. Accordingly, speculation as to some remote, never expressed congressional purpose to dissociate national American policy from private individual action by expatriation and banishment cannot serve to avoid the conclusion that § 349(a)(3), as here applied, is "concerned solely with inflicting effective retribution upon" Americans serving in foreign armies (*Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 182); so understood § 349(a)(3), as here applied, is unconstitutional under the rulings of this Court in *Trop* and *Mendoza-Martinez*.

II

The petitioner never renounced or intended to renounce his American citizenship or allegiance. In such circumstances § 349 (a) (3) is inapplicable. Any other construction of § 349 (a) (3) would render it unconstitutional. The determination below is in conflict with the rulings of this Court or raises important questions of constitutional law to be settled by this Court.

The record here is devoid of any evidence of renunciation of, or any intent to renounce, his American citizenship by Marks. The proof discloses only the intention to retain American allegiance and citizenship. Although Marks was eligible for Cuban citizenship because he had risked his life in the revolution (App. 263a-267a), Marks never applied for or received such citizenship (see App. 119a-120a, 140a). It is also uncontroverted that promptly upon receipt of State Department notice of loss of citizenship while still in Cuba, Marks first protested the action to the American Consulate (App. 127a-128a), and then publicly announced his desire to retain and fight for his citizenship (App. 282a-284a).

There is no incompatibility between petitioner's activities in the Rebel Army and his allegiance to the United States. In his initial association with the Rebel Army, Marks was part of an effort to rid the Cuban people of an oppressive tyranny (App. 141a-145a); and in his association with the early post-revolutionary activities of the Rebel Army, Marks was part of an effort to effect the social and political reconstruction of Cuba (App. 121a-126a, 176a-178a); in both of these endeavors the petitioner was connected with a movement which had the sympathy and well-wishes of the United States as evidenced by the following extracts from the April 4, 1961 report of our State Department:

> "* * * The hemisphere rejoiced at the overthrow of the Batista tyranny, looked with sympathy on

the new regime, and welcomed its promises of political freedom and social justice for the Cuban people." (App. 284a-285a)

"The character of the Batista regime in Cuba made a violent popular reaction almost inevitable. The rapacity of the leadership, the corruption of the Government, the brutality of the police, the regime's indifference to the needs of the people for education, medical care, housing, for social justice and economic opportunity—all these, in Cuba as elsewhere, constituted an open invitation to revolution.

"When word arrived from the Sierra Maestra of the revolutionary movement headed by Dr. Fidel Castro Ruz, the people of the hemisphere watched its progress with feeling and with hope.

"The Cuban revolution could not, however, have succeeded on the basis of guerrilla action alone. It succeeded because of the rejection of the regime by thousands of civilians behind the lines—a rejection which undermined the morale of the superior military forces of Batista and caused them to collapse from within.

"This response of the Cuban people was not just to the cruelty and oppression of the Batista Government but to the clear and moving declarations repeatedly made by Dr. Castro concerning his plans and purposes for post-revolutionary Cuba." (App. 285a-286a)

"Dr. Castro, in short, promised a free and democratic Cuba dedicated to social and economic justice. It was to assure these goals that the rebel army maintained itself in the hills, that the Cuban people turned against Batista, and that all elements of the revolution in the end supported the 26th of July Movement.

"It was because of the belief in the honesty of Dr. Castro's purposes that the accession of his regime to power on January 1st, 1959, was followed within a single week by its acceptance in the hemisphere—

a recognition freely accorded by nearly all the American republics, including the United States.

"For a moment the Casto regime seemed determined to make good on at least its social promises. The positive programs initiated in the first months of the Castro regime—the schools built, the medical clinics established, the new housing, the early projects of land reform, the opening up of beaches and resorts to the people, the elimination of graft in government—were impressive in their conception; no future Cuban Government can expect to turn its back on such objectives." (App. 286a-287a)

"* * * The rebel army and the 26th of July Movement expressed the profound and passionate desire of the Cuban people for democracy and freedom, a desire sanctified in the comradeship and sacrifice of the revolutionary struggle. * * *" (App. 290a)

We do not, of course, mean to suggest that Fidel Castro's subsequently disclosed amenability to communist influence and, perhaps, domination is at one with the interests of the United States. But even this development emphasized Marks' continued adherence to his American allegiance. For it was his testimony, nowhere contradicted in the record, that he resisted and actively fought communists and communist doctrine wherever he encountered them in the Rebel Army, that his militantly expressed and implemented anti-communism resulted in his frequent transfers and his demotion, and that his anti-communist activities finally caused him to come under the surveillance of the secret police (DIER) so that he was obliged to flee from Cuba to save his life (App. 123a-126a, 132a-134a).

In this same connection, the petitioner testified, and without any contradiction, that while serving at La Cabana (App. 123a) and then later while serving at Principe (App. 126a-127a), Marks accorded very considerable cooperation to members of the American consulate and the F.B.I.—

cooperation which sometimes involved dangerous breaches of duty (App. 127a). The absence of any evidence to challenge the petitioner's testimony concerning his anti-communism and cooperation with the American authorities is persuasively corroborative of that testimony in view of the obvious availability of the named American authorities and the demonstrated availability to the Service at the hearings of many Cuban refugees with direct and personal knowledge of the history of the Rebel Army.

If the record here is compared with *Kawakita* v. *United States*, 343 U. S. 717, where the most abject and slavish loyalty to the Japanese cause was not deemed antithetical to American allegiance, it becomes clear that nothing the petitioner did while in Cuba can fairly be held to demonstrate renunciation of, or an intent to renounce, his American citizenship.

Of course the act of joining and serving in Cuba in the Rebel Army cannot, without more, be conclusively presumed an intent to renounce American citizenship or allegiance. Almost since the beginning of the nation it has been a crime to enlist in the United States for foreign military service (18 U. S. C. A. 959), but the prohibition has not extended to those, as the petitioner, who left the country to enlist abroad. *Wiborg* v. *United States*, 163 U. S. 632; *United States* v. *Hertz*, 26 Fed. Cas. No. 15357 (C. C. E. D. Pa.); *United States* v. *O'Brien*, 75 F. 900 (C. C. N. Y.). Our early doctrine, which generally foreclosed individual renunciation of American citizenship, also meant that foreign military service did not effect loss of such citizenship. *McIlvaine* v. *Coxe's Lessee*, 8 U. S. (4 Cranch) 209; see also Tsiang, *op. cit. supra*, at pages 38-41, 56-61, 66-67. But even after the Congress, in the Act of 1868, permitted voluntary renunciation of American citizenship, it was considered in the administration of the Act that "voluntary entrance by a person of sole American citizenship into for-

eign military or naval service was not considered as an evidence of expatriation". Tsiang, *op. cit. supra*, at page 102.

A similar appraisal of the relationship between American allegiance and service in a foreign army was made by the President's Commission on Immigration and Naturalization when it pointed out:

> "Service in foreign armies by American citizens can be motivated by many purposes entirely consistent with allegiance to the United States. Thus, before entry of the United States into World War II, many Americans volunteered for service in the armies of Canada, Great Britain, and other nations later allied with the United States. Other young Americans serve in foreign armies because of a spirit of adventure; still others may serve as technicians." (President's Commission, Whom Shall We Welcome, p. 243.)

In such circumstances an irrebuttable presumption that service in a foreign army is renunciation of American citizenship is contrary to experience and, therefore, beyond the power of the Congress.

> "Of course a citizen has the right to abandon or renounce his citizenship and Congress can enact measures to regulate and affirm such abjuration. But whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case * * *. Although Congress may provide rules of evidence for such trials, it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establish a conclusive presumption of intention to throw off American nationality. Cf. *Tot* v. *United States*, 319 U. S. 463. Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship." [*Nishikawa* v. *Dulles*, 356 U. S. 129, 139 (Black, J., concurring); *cf. Kennedy* v. *Mendoza-Martinez*, *supra*, at pp. 215 ff. (dissent, Stewart and White, JJ., presumption of intent

to evade draft based upon fact of departure unconstitutional)]

See also:

Bailey v. *Alabama*, 219 U. S. 219;
Lindsley v. *Natural Carbonic Gas Company*, 220 U. S. 61;
McFarland v. *American Sugar Ref. Co.*, 214 U. S. 79;
Manley v. *Georgia*, 279 U. S. 1;
Western & Atlantic R. R. v. *Henderson*, 279 U. S. 639;
Heiner v. *Donnan*, 285 U. S. 312;
Morrison v. *California*, 291 U. S. 82.

It is, therefore, clear that the petitioner has neither actually nor presumptively renounced his American citizenship or allegiance. The issue which remains is whether such renunciation is a prerequisite to the applicability of § 349(a)(3). That question was not reached in *Nishikawa* v. *Dulles*, 356 U. S. 129, the single case involving denationalization for foreign military service decided by this Court.[5] We believe that the Constitution, because it "is silent about the permissibility of involuntary forfeiture of citizenship rights" (*Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 159), forbids such forfeiture and that this Court must interpolate the requirement of renunciation, as a condition to a finding of expatriation causing statelessness, if § 349 (a)(3) is to be sustained.

The unqualified right to American citizenship of the native-born is guaranteed by the 14th Amendment (§ 1, cl. 1). On the other hand, there is to be found in the Con-

[5] One District Court held the predecessor to § 349(a)(3) unconstitutional because it included non-renunciatory action. *Kiyokuro Okimura* v. *Acheson*, 99 F. Supp. 587 (D. Haw.), *remanded* 342 U. S. 899, *aff'd*, 111 F. Supp. 303.

stitution no express power or authority to denationalize a native-born.

> "The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703.

Of course, what the Congress may not take away, the citizen may voluntarily renounce. "[A] change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizenship" (*Mackenzie* v. *Hare*, 239 U. S. 299, 311); "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance" (*Perkins* v. *Elg*, 307 U. S. 325, 334; see also, *Matter of A*, 2 I & N Dec. 304, 307). Accordingly, the usual and most unexceptionable mode of expatriation of an American-born citizen is by a voluntary renunciation of that citizenship.

It has, however, also been held that native-born American citizenship can be lost by a dual-national who has by word or action explicitly or implicitly opted for his alternate nationality. *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491; *Perez* v. *Brownell*, 356 U. S. 44. But no case has held that sole American citizenship can be lost, and a status of deportable statelessness imposed, except by explicit renunciation or by action which can conclusively be deemed renunciatory of American allegiance.[6] Of course, acts which may be deemed sufficiently

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[6] *Perez* v. *Brownell*, *supra*, sustained denationalization under the predecessor to § 349(a)(5) for voting in a foreign election without regard to the existence of any renunciatory intent. But *Perez* was a dual-national who had manifested his intention to retain his non-American citizenship (see Note, 31 Fordham L. Rev. 373, 377-388), so that the case did not involve statelessness and the opinions in *Perez* do not discuss the constitutional consequences of that status. Moreover, *Perez* was an action for a declaratory judgment to determine status as a citizen and, therefore, did not reach the issue of deportability. 356 U. S. at page 65.

demonstrative of an election of allegiance by a dual-national do not necessarily establish voluntary renunciation of sole American allegiance resulting in statelessness. For the opinion of Chief Justice Warren in *Trop* v. *Dulles*, *supra*, eloquently demonstrated that the imposition of a condition of statelessness must, constitutionally, be considered and treated differently from other more conventional forms of governmental action such as denaturalization or criminal penalties when he pointed out that statelessness is

> "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights." (356 U. S., at pp. 101-2.)

These remarks are closely modeled after the earlier observation that

> "* * * [N]o description of expatriation as the loss of particular rights is adequate. For expatriation represents a loss of the right to have rights—loss of membership in an organized community capable of guaranteeing any rights at all. The individual becomes a stateless person, with no right to stay anywhere on the face of the earth. Every 'sovereign' State has the right to expel aliens from its borders, and modern States including the United

States do so freely. Neither has he a right to leave any country; no State is obliged to issue a passport to him, and no State is obliged to admit him without one. Moreover, if a stateless person is a victim of a 'denial of justice' by the governmental authorities of a State, he has no recourse whatever. Under contemporary international law neither the governments of individual States nor international organizations are considered to have legal standing to intervene in his behalf. In summary, the stateless person has no rights, either intranational or international, which are inalienable. He exists at the mercy of the State in which he resides." (64 Yale Law J., at pp. 1190-1191.)

"* * * Since the 1920's, when statelessness was first recognized as a world problem, every international conference on nationality has explicitly condemned legislation which results in the creation of stateless persons. The recognized treaties are unanimous in their disapproval of statutes which denationalize individuals without regard to whether they possess two nationalities. And the Universal Declaration of Human Rights strongly reaffirms the right of every individual to retain a nationality." *id.*, at 1195.)

We have already shown that the statutory history, meaning, and application of § 349(a)(3) provide support for the constitutionally required inquiry into Marks' retention of his American allegiance (see pp. 15-18, *supra*). For § 349(a)(3), as here applied to persons of sole American nationality, is the product of the congressional purpose to take American citizenship from those believed to hold no or a diluted allegiance to this country. The interpretative experience of the post-1940 legislation dealing with denationalization for foreign military service tends to confirm the materiality of the factual inquiry whether such service is instanced by an adherence to or a renunciation of American allegiance.

In the Matter of S, 1 I & N Dec. 476, concerned a dual-national, a citizen of Canada and of the United States, who registered for the Canadian draft and sought to enlist in the Canadian Army. The Service held that loss of American citizenship did not necessarily follow. In the cited case, Prof. Freund, an eminent authority on constitutional law, noted "that the fact that the applicant registered for the draft in Canada is not a voluntary abandonment of American citizenship" (p. 483), and the then Attorney General Clark agreed, saying:

> "Under the circumstances of the war it may well be that his registration and effort to enlist are to be attributed to a motive to join a war consistent with the interests of the United States." (p. 484)

In *Shibata* v. *Acheson*, 86 F. Supp. 1 (S. D. Cal), where it appeared that an American conscripted into the Japanese Army maintained his intention to remain an American citizen and to return to the United States, service in the foreign army did not result in denationalization. Again, in *Scardino* v. *Acheson*, 113 F. Supp. 754 (D. N. J.), an American conscripted into the Italian Army during the war, who took the required Italian oath of allegiance, was not denationalized when it was found that he had been unwilling to fight American soldiers. See also, *Dos Reis ex rel Ca[illegible]ra* v. *Nicolls*, 161 F. 2d 860 (C. A. 1).

A perceptive analysis of the foreign military service cases up to 1952 concluded that:

> "If he [the soldier] manifested by overt acts prior, during or subsequent to induction, a continuing allegiance to the United States the military service is deemed involuntary." (Note, 54 Columbia Law Rev. 932, 941).

The same analysis found that the effect of the enactment of § 349(a)(3) in 1952 was to strengthen the foregoing conclusion:

> "In view of the change in the function of this provision [§ 349(a)(3)], the courts are likely to

> expatriate for service in a foreign army only where the motives for enlisting were inconsistent with allegiance to the United States." (*id.* at p. 942.)
>
> "* * * the courts have implicitly drawn a distinction between dual nationality and dual allegiance. In the latter area, expatriation has been refused if the actor's motives were not indicative of foreign attachment." (*id.*, at p. 943.)

Judicial power to construe § 349(a)(3) so as to interpolate an intention to renounce American allegiance in cases involving persons threatened with statelessness by denationalization cannot be disputed. Interpolation of a specific and actual intent in order to save a federal statute from unconstitutionality is an established practice. See *e.g.*, *Screws* v. *United States*, 325 U. S. 91. Similarly, where federal legislation impinges upon cherished and fundamental constitutional rights, the legislation will, wherever possible, be read to be limited to the precise action or intention which may be constitutionally regulated, although language to such effect is absent from the statute. See, *e.g.*, *Dennis* v. *United States*, 341 U. S. 494. Such a reading of § 349(a)(3) is particularly authorized in view of the doctrine that in cases which involve "the purpose of depriving one of the precious right of citizenship the facts and the law should be construed as far as is reasonably possible in favor of the citizen." (*Schneiderman* v. *United States*, 320 U. S. 118, 122; quoted with approval in *Nishikawa* v. *Dulles*, 356 U. S. 129, 134-135.) Thus it has been consistently acknowledged that, for constitutional reasons, § 349(a)(3) must be read to require clear, convincing and unequivocal proof that the expatriating act was voluntary (see *Nishikawa* v. *Dulles*, *supra*; *Matter of A*, 2 I & N Dec. 304), although the law contains no language expressly imposing such an evidentiary requirement.

The denaturalization and denationalization cases in this Court amply evidence the judicial practice of interpolat-

ing standards and quanta of proof calculated to reconcile the crushing judgment of loss of American citizenship with constitutionally permissible legislative powers and objectives. (See, *e.g.*, *Baumgartner* v. *United States*, 322 U. S. 665; *Bridges* v. *Wixon*, 326 U. S. 135; *Knauer* v. *United States*, 328 U. S. 654; *Schneiderman* v. *United States*, *supra*; *Nishikawa* v. *Dulles*, *supra*.) The general "presupposition of our law to resolve doubts * * * against the imposition of a harsher punishment * * *" (*Bell* v. *United States*, 349 U. S. 81, 83) has special applicability in exclusion and deportation cases where the Court has refused to "assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10; see also *Barber* v. *Gonzales*, 347 U. S. 637, 642-643; *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391.

United States v. *Minker*, 350 U. S. 179, affords an illuminating illustration of the latitude of construction available in this case. § 235(a) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. 1225(a)] permits immigration officers to subpoena and question "witnesses" on any matter relevant to the enforcement of the Act. The Service invoked § 235(a) as authority to question a naturalized citizen to determine if cause existed for his denaturalization. It was held that, although it could not be denied that the word "witnesses" could "readily be deemed to cover" the citizen under investigation (350 U. S., at p. 186), § 235(a) would not be so read on the grounds that "Congress has not provided with sufficient clarity that the subpoena power granted by § 235(a) extends over persons who are the subject of denaturalization investigations * * *" (*id.*, at p. 190). This manner of statutory construction was explicitly based upon the special considerations which underlie cases involving loss of citizenship (*id.*, at pp. 187-8).

No previous cases more impellingly evoked the exercise of the foregoing principles and practice. Never previously has this Court been confronted with the prospect of adjudging a native-born American stateless and deportable. Unless expressly required, no statute should be construed to impose such a condition contrary to the intent of the subject of that status. Nationality is society's principal gravitational force; without it the individual is in the limbo of perpetual and omniprevalent alienage—he is an alien, literally a stranger, everywhere in the world. To be stateless is to be without the protection of any state anywhere. Previously, we associated statelessness with the tragic dilemma of those former German citizens rendered aliens in their own country by Hitler's racial laws. The question here is whether a similar obnoxious condition can constitutionally be imposed upon a native-born American who never chose to relinquish or renounce or replace his American citizenship.

The proposal to denationalize and deport the petitioner, notwithstanding the total absence of any proof of an intention of expatriation, may occasion no shock to some who conclude that the unprecedentedly harsh treatment of Marks, including the devastating judgment of statelessness, warrants no sympathy in view of his role in post-revolutionary Cuba. But rendering the petitioner stateless for action not amounting to voluntary and intentional expatriation threatens us all. If Marks' citizenship may be taken away from him because of politically offensive behavior which is not incompatible with allegiance to the United States and American citizenship, then none of us is safe from the risk of banishment. It is for this reason that we have urged the construction of § 349(a)(3) to be found under this point.

Neither Lafayette nor Kosciusko repudiated his native nationality by assisting the American Revolution. Ameri-

cans risked their lives throughout the 19th Century in support of the cause of national independence in Europe. Even before our entrance into World War I, Americans, conscious of and loyal to their American allegiance, fought on the side of our future allies. Again, during the Spanish Civil War, many Americans chose to demonstrate their faith and belief in the principles of democracy by fighting actively with the established Spanish Republic against the insurgency of Franco. And during World War II, thousands of Americans decided, before our government was ready to do so, that they would commit their safety and even their lives to resist German aggression.

The current of present events and the prospect of future ones do not lessen the impulse of Americans to support their political convictions by taking part in foreign struggles where freedom is in issue. Deference to this impulse will come not only from organized official action such as the Peace Corps or our government assistance to other nations in the form of money, materials, and personnel, but also from individuals. It surely cannot be the intention to strip Americans of citizenship if they should decide to enlist in the cause of Israel if that country should be invaded by the Arab powers, or to fight to support any of the new African nations where threatened by a power intent upon restoring such nation to its previous colonial status.

The argument under this head involves transcending issues of political freedom and the integrity of American citizenship. A country capable of recognizing that Princess Grace Kelly did not forfeit her American citizenship by assuming the role of a reigning sovereign of a foreign country should be just as capable of recognizing that Herman Marks did not lose his American citizenship because he participated in the post-revolutionary police and reconstruction activities of the Cuban Rebel Army. The common principle in the two cases is that citizenship of a native-

born American is not something which can be taken away, but is a status which can be lost only by a knowing and voluntary renunciation. This principle underlies the proper construction of § 349(a)(3) pursuant to the Constitution and the applicable authorities.

For the reasons indicated, the convincing proof that the petitioner intended not to renounce, but to retain his American citizenship and allegiance, and that his activities in Cuba and the Cuban Rebel Army were compatible with American allegiance, preclude a finding of expatriation, statelessness, and deportability.

III

The administrative arrest of petitioner, and his subsequent detention based upon his alleged deportability without any prior competent judicial adjudication of his alienage were improper and unconstitutional exercises of the judicial power by an administrative agency. The issue here raised is one of great constitutional importance and should be settled by this Court.

Marks' detention started on the evening of January 25, 1961. At 8:00 P. M. of that evening, two Service investigators came to Marks' apartment (App. 62a, 67a). From that time until his release on bail almost nine months later he was, at all times, in the custody of the Service. While there is conflict in the testimony on this score, it is fair to conclude that after the Service investigators started to question Marks, and particularly after he was brought from his home to the Investigations Section of the Service's office sometime between 9:30 and 10:00 o'clock at night for interrogation which lasted almost five hours, Marks was not at liberty to leave the custody of the Service. (See App. 61a-81a, 134a-139a.) Marks was thus detained by the Service although, admittedly, no grounds for arrest existed at the time (App. 73a-74a).

At the end of the interrogation, a sworn statement in the handwriting of one of the investigators was signed by Marks. The statement referred to Marks' service in the Cuban Rebel Army from 1958 to May, 1960. It was conceded that much of the language in the statement was composed by the investigator (App. 80a-81a, 245a-246a) and, in at least one respect, based on nothing which Marks told the scribe of the statement (App. 239a-245a).

Promptly upon the execution of his statement, Marks was told he was under arrest and placed in jail. No writ of arrest had been issued at the time; an administrative writ of arrest was not served on Marks until 7:10 P. M. of January 26, 1961 (App. 66a-67a), almost 24 hours after the questioning began, more than 20 hours after he was brought to the headquarters of the Service, and 17 hours after he was admittedly taken into custody. Such an arrest would be unlawful if made in the course of criminal law enforcement and the statement taken would be inadmissible. *McNabb* v. *United States*, 318 U. S. 332; *Mallory* v. *United States*, 354 U. S. 449. Administrative arrest, not based upon a judicial writ, must surely be subject to no lesser strictures or standards.

Even if Marks' arrest had been attended by greater deference to the required proprieties, it was unlawful since not pursuant to judicial writ issued on probable cause supported by sworn proof, and not based upon the commission of any overt or probable criminal conduct. Service arrest warrants, once required to be based upon sworn statements as to probable cause (see former 8 U. S. C. A. 282; Rule 22, Reg. of Secy. of Labor under Immigration Act of 1917), need no oath or affirmation concerning probable cause (see 8 CFR 242.1 ff.). But the Fourth Amendment contemplates a judicial warrant of arrest based upon "probable cause, supported by oath or affirmation," not an administrative writ of arrest where the arresting agency

rather than an independent judicial officer or magistrate determines the right to arrest. The Fourth Amendment commits the authority to issue a warrant of seizure to "the informed and deliberate determinations of magistrates" and not "the officers or others who may happen to make arrests" (*United States* v. *Lefkowitz*, 285 U. S. 452, 464). Issuance of writs of arrest, under the Fourth Amendment, must be based upon findings to be made "* * * by a neutral and detached magistrate instead of being judged by the officer * * *" (*Johnson* v. *United States*, 333 U. S. 10, 14).

Abel v. *United States*, 362 U. S. 217, expressly reserved decision on the issue of the constitutionality of administrative arrests in deportation proceedings because not adequately raised below. No such waiver obtains here. For the petitioner has urged the issuance of the writ upon the ground that his detention, without judicial warrant and without probable cause based upon criminal conduct, is unlawful because it violates the Fourth and Fifth Amendments.

The petitioner's lengthy administrative detention, following upon his administrative arrest, was likewise unlawful because in derogation of the judicial function. The respondent's power to detain is strictly as an incidence of his power to deport, and both depend upon the detainee's alienage. § 242, the statute which authorizes the detention of an alien preparatory to his deportation, vests the power of such detention in the Attorney General. But neither § 242 nor any other statute has authorized the Attorney General to settle issues of citizenship, deportability and detention in the case of American-born persons. For whatever the extent of the Attorney General's power to rule on the deportability of aliens, when native-born American citizenship is shown or plausibly claimed, the issue of the existence of American citizenship is exclusively a matter for the judiciary.

Mr. Justice Frankfurter observed that the decisions of the Supreme Court "* * * requir[e] judicial as against administrative adjudication of the issue of citizenship in a deportation proceeding * * *" (*United States* v. *Minker*, 350 U. S. 179, 188). The cases sustain this view:

> "Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact * * *. To deport one who so claims to be a citizen, obviously deprives him of liberty * * *. It may result also in loss of both property and life; or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law." [*Ng Fung Ho* v. *White*, 259 U. S. 276, 284-285 (Brandeis, J.)]
>
> "[If petitioner had claimed American citizenship] and had supported the claim by substantial evidence, he would have been entitled to have his status finally determined by a judicial, as distinguished from an executive, tribunal." (*United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 152.)
>
> "* * * [I]n the event an alleged alien asserts his United States citizenship * * * and supports his claim by substantial evidence, * * * he [is] entitled to a trial *de novo* of that issue in the district court." (*Kessler* v. *Strecker*, 307 U. S. 22, 34-35.)

The exclusivity of the judicial power to determine the issue of plausibly claimed American citizenship is evidenced by the line of authorities since *Ng Fung Ho* v. *White*, *supra*, which declared the doctrine of exhaustion of administrative remedies inapplicable in such cases.

> "That relators had the right to have the question of their citizenship determined in advance of deportation proceedings, under the claim here made is settled by the authorities."
>
> *Ex parte Kazan*, 5 F. 2d 243, 244 (S. D. Texas, 1925) (Hutcheson, J.).

Accord:

United States ex rel. Gonzalez v. *Kirk*, 39 F. 2d 246 (S. D. Texas, 1930);
Ex parte Gros, 123 F. Supp. 718 (N. D. Cal., 1954).

See also:

Wong Wing Foo v. *McGrath*, 196 F. 2d 120, 122 (C. A. 9, 1952) (Denman, C. J.) ("Nothing in the * * * text [of the statute authorizing proceedings to establish citizenship] suggests that the 'action' * * * is to succeed some prior administrative proceeding." The action was one "which plaintiff could have brought as soon as the immigration officials refused to accept his passport and to allow him to enter.")

United States ex rel. Chin Ming Mow v. *Shaughnessy*, 118 F. Supp. 490, 493 (S. D. N. Y., 1953) (Conger, J.) ("There is nothing in § 503 [former statute authorizing proceeding to establish citizenship] which indicates that an action of this type is to succeed some prior administrative proceeding.")

The foregoing considerations have led Mr. Justice Black to note in a concurring opinion that the issue "whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights" (*Nishikawa* v. *Dulles*, 356 U. S. 129, 139).

If, as seems clear, the petitioner was entitled to a judicial hearing on the issue of his citizenship, it is no answer here that he has ultimately received such a hearing. Entitlement to a judicial hearing may, in cases involving property rights, be properly deferred until the completion of some other prior form of proceeding. *Phillips* v. *Com-*

missioner, 283 U. S. 589, 595-597. One commentator has observed, however:

> "Is it sufficient if relief is forthcoming via this circuitous route? In cases where personal liberty is involved, the answer would seem plainly to be *no*." [Cooper, Administrative Agencies and the Courts, p. 85 (emphasis in original)].

And where, as here, the judicial hearing is preceded by the imposition of the very injury to be reviewed, *i.e.*, detention pending deportation in this case—the deferment of the constitutionally guaranteed judicial hearing to the conclusion of the prior executive proceeding is in derogation of that guarantee. Cf. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 423-425; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (App. D. C.), *cert. den.*, 347 U. S. 990; Admin. Pro. Act § 10 (d), 5 U.S.C.A. 1009(d). The established right to a judicial determination of citizenship in habeas corpus for the purpose of settling the citizen's right not to be deported or detained pending deportation is obviously not satisfied by a procedure where a summary administrative arrest and nine months' detention pursuant to administrative determination precedes the constitutionally required hearing.

Marks was entitled to have the issue of his citizenship determined judicially. § 349(a)(3), as here applied over his timely objection, denied him that right until after his arrest and lengthy detention. Marks was thereby *pro tanto*, denied the right to a judicial determination of whether he was an alien subject to such administrative arrest and detention.

IV

The finding of alienage here is contrary to the applicable decisions of this Court.

The argument under this heading reviews the evidence and the law to determine whether Marks has been denationalized under § 349(a)(3). Three preliminary observations are in order:

(1) The prior administrative decisions on the issues under review are entitled to no weight. *Perez* v. *Brownell*, 356 U. S. 44, 47; *Kessler* v. *Strecker*, 307 U. S. 22, 34-35; *United States ex rel. Medeiros* v. *Watkins*, 166 F. 2d 897 (C. A. 2); *Frank* v. *Rogers*, 253 F. 2d 889, 892 (App. D. C.); *Chin Hoy* v. *United States*, 293 F. 750 (C. A. 6).

(2) Marks' *prima facie* case on the issue of his citizenship arises by dint of his conceded American birth (*Nishikawa* v. *Dulles*, *supra*, at p. 133; *Perez* v. *Brownell*, *supra*, at p. 47), and thereupon "The Government must prove the act of expatriation on which the denial [of citizenship] was based by '"clear, unequivocal, and convincing" evidence which does not leave "the issue in doubt".' *Gonzales* v. *Landon*, 350 U. S. 920; see *Schneiderman* v. *United States*." *Perez* v. *Brownell*, *supra*, at p. 47. This evidentiary standard is applicable to cases involving denationalization for foreign military service. *Nishikawa* v. *Dulles*, *supra*.

(3) This Court must re-examine for itself, and independent of the limited scope of review provided by Rule 52(a), Fed. R. Civ. Pro., whether the Government has carried the prescribed burden of proof. *Baumgartner* v. *United States*, 322 U. S. 665, 670-671; *Chaunt* v. *United States*, 364 U. S. 350, 353.

A.

The finding that the petitioner's service in the Cuban Rebel Army after January 2, 1959 was voluntary is in conflict with *Nishikawa* v. *Dulles*, 356 U. S. 129

Marks entered the Cuban Rebel Army in 1958 during the Cuban revolution and some time prior to January 2, 1959. But since the Rebel Army could not, prior to the overthrow of the Batista government, be deemed "the armed forces of a *foreign state*", Marks' activities in the Rebel Army prior to January 2, 1959 are not cited as part of the amended charges. Consequently, the issues here necessarily relate to the nature and effect of Marks' activities in the Rebel Army after January 2, 1959, rather than his entry into the Rebel Army some time earlier.

Nishikawa v. *Dulles*, 356 U. S. 129, conditions denationalization for foreign military service upon the most convincing proof that such service was voluntary. Where entry into a foreign military force is the result of conscription, or where service therein is enforced by laws against desertion, then there has been a failure to establish the requisite voluntariness (*Matter of A*, 2 I & N Dec. 304; 40 Opin. Att'y Gen. 553; *Matter of R*, 3 I & N Dec. 470).

In *Matter of A*, *supra*, a native American, born of Mexican parents, voluntarily joined the Mexican Army prior to the time when entry for service in a foreign army was grounds for expatriation. He continued to serve until a time after the effective date of the legislation providing for denationalization where one serves in the army of a foreign state of which he is a national. The Board of Immigration Appeals, as approved by the Attorney General, held the service to be involuntary and no grounds for expatriation, notwithstanding the original voluntary enlistment, in view of the Mexican laws against and punishment for desertion.

Similarly in 1947, the then Attorney General Clark advised Secretary of State Marshall that where an American citizen under the age of eighteen entered the armed forces of a foreign state of which the minor was also a national, and then continued in such foreign armed forces after the age of eighteen

> "My conclusion is that continued service after the age of 18, whether the service began prior thereto by voluntary enlistment or by involuntary induction, is not alone sufficient to cause loss of United States nationality" (40 Opin. Att'y Gen. 553).

Again, in *Matter of R, supra*, a German-American inducted into the German Army while under eighteen who served until after the age of nineteen, and took an oath of allegiance to Germany in 1944, was held not to have been expatriated. The original entry being unexceptionable due to his age, the respondent in that case was deemed not responsible for his continued service since it was not shown that he could have obtained a discharge when he passed the age of eighteen and that he knew he could obtain such a discharge but failed to do so.

From the foregoing it is settled that the voluntariness of Marks' service in the Rebel Army must be appraised as of January 2, 1959 and thereafter. His original enlistment and service prior to January 2, 1959, not being in the armed forces of a foreign *state*, are concededly no grounds for expatriation. The question which remains, therefore, is whether the respondent has proven convincingly that Marks' activity in the Rebel Army *after* January 2, 1959 was voluntary.

The term "voluntary" has a special and artful meaning in matters pertaining to loss of citizenship, and requires some discussion before reviewing the proof on that score.

One competent analysis of the term "voluntary" in expatriation cases suggests that it means action which re-

nounces American allegiance. Note "'Voluntary': A Concept in Expatriation Law", 54 Columbia Law Review 932. If so, then clearly Marks' actions were not voluntary. But it is unnecessary to go so far as to equate "voluntary" with renunciation of allegiance. It is sufficient that, in expatriation cases, involuntary does not mean acts performed solely because of coercion or duress; action is involuntary if the threat of punishment or injury contributes substantially to the action.

Foreign military service, performed pursuant to conscription, is involuntary even if the individual performing such service might have done so in the absence of coercion or duress. [See, *e.g.*, *Matter of A*, 2 I & N Dec. 304; see also *Podea* v. *Acheson*, 179 F. 2d 306 (C. A. 2); *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2).] No expatriation case involving foreign military service has required a showing that the individual would not have served in the foreign army if not for conscription. The rule is, apparently, that so long as some form of compulsion exists, then foreign military service is involuntary unless it clearly and affirmatively appears that that service was wholly volitional and the compulsion played no part.

Moreover, the compulsion involved need not be solely the effect of a conscription law. *Stipa* v. *Dulles*, 233 F. 2d 551 (C. A. 3), recognized that economic compulsion of any substantial degree renders service in a foreign government involuntary for purposes of denationalization. In *Kenji Kamade* v. *Dulles*, 145 F. Supp. 457 (D. Cal.) (Weinfeld, J.), it was held that a Japanese-American who took a position as a school teacher in Japan was not expatriated thereby under § 349(a)(4) (which expatriates for working for a foreign government). The teacher's need to earn a livelihood was held to render such employment involuntary. Again, in *Insogna* v. *Dulles*, 116 F. Supp. 473 (D. D. C.), it was held that an American citizen of Italian birth who

took a job with the Mayor of an Italian city was not expatriated. A job taken for purposes of subsistence did not constitute voluntary employment. In none of the cited cases does it clearly appear that the citizen could find no other means of sustenance.

The question whether petitioner's alleged military service was voluntary, as that term has been construed in the denationalization cases, ultimately involves an assessment of three principal events in the period following January 2, 1959:

1. Marks' return to Cuba in the early part of January, 1959;

2. Marks' resumption of activities in the Rebel Army shortly after his return in January, 1959;

3. Marks' continuance in the Rebel Army from January, 1959 to May, 1960.

A review of each of these circumstances, when measured by *Nishikawa*, makes it clear that Marks' alleged military service after January, 1959 was, as a matter of law, not voluntary.

1. Marks' return to Cuba in early January, 1959.

In the early part of November, 1958, Marks left combat duty to obtain medical treatment for wounds received to his knee and ankle (App. 148a). Unable to obtain proper medical attention for him in Cuba, the Rebel Army arranged for Marks to fly to Key West, Florida, for such treatment (App. 148a-149a). Sometime in the first week of January, Marks left Key West or Miami to return to Havana (App. 149a-150a).

During the period that Marks was out of Cuba, Batista fell, Castro took over Havana, and the military phase of the revolution was at an end. When Marks returned to Cuba there were no longer any hostilities in progress.

Marks testified, without contradiction, that when he returned to Havana he considered that the "war is over" and that he was returning "for a reunion with friends that I fought with during the revolution" (App. 150a). It was the uncontradicted testimony of Marks that he had no intention, when he returned to Cuba, to return to military service since that activity was already at an end. The Court can, perhaps, best gain insight into Marks' motives for returning to Cuba by extensive quotation from his testimony:

> "Q. Now, I'm going to ask you, Mr. Marks, to reconstruct for the Hearing Officer as fully and as completely as you can, your state of mind in the early part of January 1959 relative to your return to Cuba? A. Well, when I left Cuba with wounds in my leg, which I previously had told, that it was severely infected, upon leaving the group, I had received orders that upon completion of cure of the wounds I was to report back to Che Guavara. After the wounds were healed, which were paid for by the Revolutionary—revolution, and they also took care of me and took great care with great jeopardy to other people in getting me out of Cuba. And so I felt—I have thought of it as very thoroughly since Monday—and I wish to stress that I did have an obligation because they did pay for my medical attention, they did get me money, of assistance, during the time of recuperation. So, therefore, I did have an obligation to report back. But when I —in January the war was over, there was peace— I considered at that time that it was all finished, and I would go back and have a complete reunion with the men, who I had fought with. Also I wish to bring out a point which hasn't been brought out before—as the Court probably knows, I have been poor all my life. I have never had nothing—too much, and according to the rules of the Revolutionary government that through the agrarian re-

form, their land would be given—unused lands or government owned land would be given to the poor. And as Fidel also stated in the mountains, that men serving in the Revolutionary government would have a preference, a priority in receiving said tokens of land, if they had nothing. I have dealt slightly with agriculture and through information and seeing what is possible in Cuba in the reform of agriculture, I found agriculture could be a very lucrative income, and it was my intent to get a portion of this land and also begin in setting up my own farm and plantation, where I could have secure and permanent income. As many Americans who have land and property in Cuba also receive a very lucrative income from said property—I don't recall the name of the man at this instance, but he did have a plantation—coffee plantation in the Sierra Maestra, and his yearly income from that plantation was $85,000 a year. So, I'm sure the court can understand that my desire to get a part of this land which is virgin land, which would have required a great deal of work to clear, but complete it would have been a very lucrative and very beneficial for a future. And to maintain it it would not require permanent residence in Cuba, as I am sure that you know many Americans own property in Cuba and spend practically no time in Cuba whatsoever—and still receive a very lucrative income.

Q. You mean used to? A. Used to.

Q. Now—I'm sorry—have you finished your answer? A. No. And I considered that being as it was under the Revolutionary Law, at the time that there would be a complete democratic country and once free elections has been established, it would return to a very prosperous and fertile business.

• • •

Q. Now, Mr. Marks, at the time of your return to Cuba in the early part of January 1959, did

you return for the purpose of engaging in any military activity? A. No, I didn't.

Q. To your knowledge, was there any military activity going on? A. No.

* * *

Counsel to Respondent:

Q. Did you intend to go back to perform any combat duty? A. No.

Q. Did you go back with the intention of being a soldier? A. No.

Q. Did you go back with the intention of serving in the Cuban Army? A. No.

Q. Did you go back with the intention of serving in the Revolutionary Army? A. No.

Q. Did you understand that the Revolutionary Army would continue with any kind of military activities upon your return? A. No, I didn't. I was under the interpretation that the revolutionary forces would be nonparticipant unit, only as a police unit, until a free election." (App. 187a-190a)

In *Nishikawa* the finding of the trial court, which was not disturbed by this Court, was that Nishikawa, a national of Japan, had returned to Japan with the intention and expectation of being drafted. Nishikawa was a Japanese national, returning to Japan in 1939, knowing that he was subject to conscription in the Japanese Army, and knowing that Japan was conscripting its nationals. According to the trial judge, Nishikawa "went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army * * *. He went over and he waited until they reached him on the draft, and when they did he was drafted" (356 U. S., at pp. 132-133). It was nevertheless held that Nishikawa's subsequent service was not voluntary and therefore not expatriating.

Similarly, in *Podea* v. *Acheson*, 179 F. 2d 306 (C. A. 2), a native-born American who had been brought as a child to Roumania by his Roumanian parents, returned to the United States as a reporter, and then went back to Roumania where he was inducted into the Roumanian Army. Although Podea could have remained in the United States either as a citizen or as a permanent immigrant, his return to Roumania and induction there were held no basis for his expatriation. And in *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2), a native-born American brought to Italy as an infant by his Italian parents, who served two tours of duty in the Italian Army and took an oath of allegiance to the King of Italy, was held not to have been expatriated although he had an American passport and could have left Italy for the United States.

As compared with the facts in the governing cases, and particularly *Nishikawa*, the petitioner's return to Cuba when hostilities were at an end, without any intention of engaging in any military service, and without any knowledge or belief that he, as an American citizen, could or would be impressed into the military service in Cuba, forecloses the use of such return as a basis for expatriation. It may fairly be concluded that the authority of *Nishikawa* precludes any reliance upon Marks' return to Cuba in early January, 1959, as evidence of his voluntary service in the Rebel Army.

2. Impressment of Marks into service in the Rebel Army in January, 1959.

Upon Marks' return to Cuba he sought out Che Guevara, his former chief (App. 151a). With Che Guevara he went to La Cabana—that was the place where "all the men I served with in the Sierra Maestra were stationed" (App. 151a). Marks stayed overnight at a room in Guevara's home, had breakfast with Guevara, and promptly thereafter was told to perform certain duties at La Ca-

bana (App. 151a-152a); "he just told me—you're going to take over such and such a job—and that's it" (App. 152a). When asked why he complied with the order of Che Guevara—who stands second in power in Cuba only to Castro—the petitioner testified: "No one refuses an order from Che Guevara, believe me" (App. 152a); "you would find a million dollars faster by putting your head through that pillar than refusing Che Guevara" (App. 153a); "that is plain suicide by refusing an order from Che Guevara" (App. 153a). Marks plainly was not at liberty to refuse the order of Che Guevara, particularly since Marks still considered himself, at the time, a member of the Rebel Army (App. 152a-153a).

Guevara's conscription of the petitioner by fiat was, for present purposes, the equivalent of the Japanese conscription of Nishikawa by law. This Court has just recognized and held that the directive of a high official has the same coercive effect as a duly promulgated law and compliance with the former is no less the result of coercion than compliance with the latter. *Lombard* v. *Louisiana*, 31 U. S. L. W. 4476. Enforced compliance can be achieved "by an official command which has at least as much coercive effect as" a formal law (*Id.*, at p. 4478). Here the ultimate issue on the question of voluntariness is the petitioner's state of mind, and not the technicality of legal amenability to conscription laws.

Nishikawa, receiving a draft notice in the mail, was under no greater state of compulsion than was Marks when he received a direct and personal order to duty from one of the highest and most powerful figures in the Cuban revolutionary force. Viewed realistically, Nishikawa had more time for deliberation and more opportunity for exploring alternatives than Marks had when confronted with a directive from Che Guevara. If it was involuntary service for Nishikawa to obey a notice received through the mail, it was

likewise involuntary for Marks to have accepted the command uttered in his presence by a revolutionary leader with unlimited powers and addressed to an individual who still considered himself subject to the orders of his superior. It will, of course, be remembered that Nishikawa was a dual-national, not confronted with the prospect of statelessness—a circumstance pointing to the need here of a construction of the law and facts even more favorably to Marks than to Nishikawa.

3. Marks' service in the Rebel Army from 1959 to May, 1960.

That Marks, a captain in the Rebel Army, had no option but to serve in the Rebel Army after his return to Cuba in 1959 is clear from the proof.

Marks testified, without contradiction, that he requested permission to leave the Rebel Army after January, 1959, but was denied such permission (App. 191a-192a). Any efforts at self-help in this regard would have constituted counter-revolutionary activity or desertion punishable by death, and Marks was fully aware of this situation (App. 131a-132a, 192a). Marks testified that he was not at liberty to leave the Rebel Army without the prospect of imprisonment or execution; he stated his understanding that if he left the Rebel Army without permission the consequences would be "for my desertion—the penalty for desertion was imprisonment or death by the firing squad" (App. 132a). Those men who had attempted to leave, according to Marks, "are now serving prison terms of up to ten years" (App. 160a).

In this respect it is noteworthy that our State Department commented that:

> "* * * Maj. Huber Matos Benitez, revolutionary commandante of Camaguey Province, was a hero of the Sierra Maestra. When Major Matos challenged

> the spread of Communist influence and requested permission to resign from the army, he was put on trial for conspiracy, sedition, and treason and sentenced to twenty years' imprisonment. * * * " (App. 288a).

Every witness who was questioned on the matter, the Service's witnesses as well as petitioner, testified that leaving the Rebel Army without permission amounted to the grave and punishable crimes of desertion and counter-revolution (App. 132a, 160a-161a, 190a-192a, 208a, 213a-214a, 218a, 230a), irrespective of whether the deserter was American or Cuban (App. 211a-213a). Various notices concerning desertion appear in the Official Gazette for July 13, 1959 which is Exhibit 14 at the Service hearing. And in the case of petitioner, the threats to his life when he finally sought to escape from Cuba (App. 133a-134a) confirm that service in the Rebel Army was obligatory, not voluntary.

The fact that Marks made no effort prior to May, 1960, to escape from the Rebel Army or Cuba is, of course, not significant. No such proof was proffered or required in *Nishikawa* or in any other case on the subject. It is enough that Marks' continued service was mandatory under the laws and practices governing desertion. For in such circumstances his service was, under the cited authorities, involuntary and, therefore, no grounds for expatriation.

Nor is it required by the cases that, as was suggested below (203 F. Supp., at p. 394), expatriation follows for failure to lodge complaint with the American consul against conscription or continued service. In *Nishikawa* it was specifically observed that the "petitioner did not protest his induction or attempt to renounce his Japanese nationality, to return to the United States or to secure the aid of United States consular officials." (356 U. S., at pp. 131-132.) The pertinency of the *Nishikawa* ruling here is clear from the uncontradicted testimony of Marks that many

Americans in Cuba who had requested aid of the consular offices had received no help (App. 164a-165a).

It is, in any event, unnecessary to demonstrate that Marks' activity with the Cuban Rebel Army from early January 1959 to May 1960 was solely and exclusively caused by physical coercion or fear of the consequences for desertion. It is enough, as we have indicated, that a *bona fide* fear of disastrous consequences was a contributing factor to Marks' stay in the Rebel Army. Such a circumstance, if present and contributory, is sufficient to render Marks' service in the Rebel Army involuntary under the applicable authorities. Under this standard the proof fully and amply sustains a finding of involuntariness; at the least, the record raises sufficient doubts on this score so that it was inconsistent with *Nishikawa* to find that the heavy burden of proof here imposed upon the respondent had been met.

B.

Marks never served in "the armed forces of a foreign state" as those terms are used in § 349(a)(3)

§ 349(a)(3) prescribes loss of citizenship for service in the "armed forces of a foreign state" irrespective of whether the individual concerned is a national of that foreign state; § 349(a)(4), on the other hand, denationalizes for employment by a foreign state of which one is a national. Since the statute thus distinguishes between service in an armed force and other forms of employment, it is here important to define exactly the term "armed forces" as used in § 349(a)(3). For unless Marks served in an "armed force" as distinct from other foreign employment, denationalization would not be permissible.

Not all employment involving the use of arms constitutes service in an armed force: Police, prison guards, correction officers, peace officers, etc., all carry and may use arms, yet are plainly not members of an "armed force".

An armed force is characteristically an armed body of men organized for the purpose of waging or preparing to wage war. Thus, the word "army" derives in part from the term "armata" meaning "armed force". 1 Century Dict. 1914 ed.) 315. The equation of the terms "armed forces" and "military" is demonstrated in 2 Encyc. Brit. (14th ed.) 396 which defines "army" as a "considerable body of men armed and organized for the purpose of warfare on land * * *, or the whole armed force at the disposal of a state or person for the same purpose * * * *". The federal statute defining "armed force" has exclusive reference to the Army, Navy, Air Force, Marines, or Coast Guard [10 U.S.C.A. § 101 (4)].

Accordingly, in *United States* v. *Kenny*, 247 F. 2d 139, 143 (C. A. 2), the identification of the term "armed forces" solely with the Army, Navy, Air Force, Marines, or Coast Guard was held so clear that

> "The contention that service with the National Guard constitutes service in the Armed Forces of the United States for purposes of Section 315 of the Immigration and Nationality Act is preposterous."

Similarly, it has been held that neither the Canadian Officer Training Corps [*in the Matter of O*, file =56108/718 (BIA, 1942); *In the Matter of Z*, 2 I & N Dec: 346 (1945)] nor the Queens University Air Reserve [*In the Matter of L. F.*, 2 I & N Dec. 455 (1946)] is an "armed force" for purposes of denationalization. In *Matter of Z, supra*, at p. 350, it was pointed out that the statute contemplates "only service in that part of a foreign army which is activated or subject to active military duty * * *."

The official documents here in evidence, as well as the oral testimony, establish that in the period of time here in issue following January 2, 1959, and after the termination of hostilities between Castro and Batista, the Rebel Army was not an "armed force" as hereinbefore defined and understood.

A fair reading of the record will show that when, on January 1, 1959, the Rebel Army under Castro had concluded the rout of the Armed Forces of Cuba under Batista, the military function of the Rebel Army was at an end. There is no proof that the Rebel Army thereafter engaged in any combat or other distinctively military activity. Instead the untrained, revolutionary, peasant force which, as the Rebel Army, had made the revolution (App. 93a, 121a, 122a), became the militant, but not military, core of the effort to consolidate, implement, and safeguard the revolution. In this endeavor the personnel and ranks of the pre-January 1, 1959 format were retained, but the function shifted from the conduct of a revolutionary military war to revolutionary social and economic reconstruction.

One recent authoritative analysis of the non-military nature of the post-January 1959 Rebel Army observed:

> "*Armas? Para qué?* Castro's question of January, 1959, has long since been laid to rest in the vast cemetery of betrayed ideas beside the slogan that was soon to follow: 'The revolution makes barracks into schools.'" (Leo Sauvage, Castro's Foreign Legion, 27 The Reporter, No. 5, Sept. 27, 1962, p. 21.)

> "From the very start * * * Fidel Castro took great care to place strict limits on the role and the powers of his troops in olive green [the Rebel Army]. Perhaps he simply wanted to prevent the national army from becoming so powerful that it might some day follow the unhappy precedents set by so many Latin-American armies, including Batista's Cuban 'army of sergeants.' More probably Castro mistrusted the Ejército Rebelde [Rebel Army] for much more immediate reasons * * *

> "Distrusting his national army, Castro founded a militia, in whose training political indoctrination took on at least as much importance as the manual

> of arms * * *. [I]n general the companies of *barbudos* who had brought Castro to power ended by being downgraded into working parties, trusted only to carry shovels rather than guns." (*Id.*, at p. 22.)

The record here fully supports the foregoing evaluation of the post-revolutionary status and function of the Rebel Army.

Thus while § 349(a)(3) is premised upon service in "the armed forces" of a foreign state, the Rebel Army was never known as the Cuban Army or the "Armed Forces" of Cuba. These designations were, in the post-revolutionary Cuban lexicon, reserved for the army of Batista for the period prior to the dissolution of the Cuban Army in October, 1959 (App. 90a, 256a-257a, 277a-279a); after October, 1959 it was intended to establish the "Revolutionary Armed Forces", an organization to be distinct from the Rebel Army (App. 268a-275a); during neither period was the Rebel Army designated the Cuban Army or the "Armed Forces" of Cuba.

The record here further establishes that the Rebel Army never had a confluence of *de facto* and *de jure* status as a military agency. During the revolutionary period the Rebel Army could not, of course, attain a *de jure* status. On January 13, 1959, after the overthrow of Batista, the organic law establishing the "Armed Forces"—Batista's army—was suspended by Law No. 13 (App. 256a-257a), but according to the Service's expert witness, Law No. 13 did not dissolve the former Cuban Army (App. 91a, 97a); that Army remained in being as the "Cuban Army" until its dissolution by Law No. 600 of October, 1959 (App. 99a, 270a). The Service's expert witness explicitly testified that prior to Law No. 600 of October, 1959 the Rebel Army "did not have that legal status" (App. 104a); another Service witness observed that the regular army continued to function up to October, 1959 while the Rebel Army "had an

awkward position, because we had authority, we made arrest, we represent the government as authorities and, yet, officially, we weren't regular army" (App. 223a). And the same Law No. 600 which, in October, 1959, recognized the existence of the Rebel Army, purported to dissolve all pre-existing military agencies and to reorganize them as part of the new Ministry of the Revolutionary Armed Forces (App. 268a-269a).

It is most significant that not until October, 1959 did the Rebel Army acquire even the semblance of legal status. For it was precisely then, according to another Service witness, that the state militia was formed (App. 226a). The report of the United States State Department of April 4, 1961 specifies the role which the militia played in post-revolutionary Cuba:

> "The history of the Castro revolution has been the history of the calculated destruction of the free-spirited rebel army and its supersession as the main military instrumentality of the regime by the new state militia" (App. 287a).

The accuracy of this description of the militia "as the main military instrumentality of the regime" was confirmed by one of the Service's witnesses, who testified that the militia was formed to engage in "war training" (App. 227a), in which capacity the militia served "all through Cuba" (App. 230a). This same witness, who had served in the Rebel Army, testified:

> "Q. And what was the distinction between the state militia and the Rebel Army? A. Well, our function was rather like a police, like a military police, or something like that.
>
> Q. That was the function of the Rebel Army? A. More or less" (App. 227a).

Juxtaposed to the described failure to accord the Rebel Army legal status until the establishment of a state militia

which would perform the military function in post-revolutionary Cuba, is the careful and inspired confinement of the Rebel Army to patriotic but non-military duties.

In Law No. 100 of February 23, 1959, the post-revolutionary nature and function of the Rebel Army were delineated in the legislation's preamble as follows:

> "WHEREAS: It is necessary to prove with repeated actions the firmness of our revolutionary struggle; the firmness of our love for the national territory; the firmness of the promises signed with blood in the battlefields; the full solidarity of the Rebel Army with the peasants and the people, in order to reaffirm and prove at the time of the Revolutionary Government that it is and it will continue to be a vehicle for the defense and betterment of the citizenry.
>
> WHEREAS: Having won the war of bullets, it is now necessary to win the war of peace, and the Rebel Army being formed mostly by the same peasants who waged the guerrilla war against the dictatorship they overthrew, nothing is fairer than to employ in a revolutionary work, those who were directly affected by the evils they fought against and fighting which a lot of their fellowmen died.
>
> WHEREAS: A sure means of keeping the morale in the Revolutionary ranks, is to engage the Rebel Army in creative tasks for the benefit of the citizenry reaffirming in this manner their civic and not their military calling". (App. 261a)
>
> "WHEREAS: The Rebel Army cannot, has been unable to and shall not be able to live with the back turned on the peasants' problems of all kinds and on those of the poor and working classes of our country and has fought and will continue to fight for a change in the social regime of traditional misery and lack of culture of the Cuban people, and it brings as a battle banner the Agrarian Reform, as a means for obtaining improvement in the life level of the peasant and of the working people, ending in this manner

and on this basis the dreadful problem of unemployment." (App. 262a).

"And, inasmuch as throughout the articles of Law No. 3 on Agrarian Reform, issued by the Office of the Commander General of the Rebel Army in the Sierra Maestra, is stipulated the development of forests wealth, dam construction and impounding of river waters for irrigation and utilization of power for the production of hydroelectric energy, construction of schools, medical dispensaries, official agencies for the technical and financial aid to peasants, sports field and farmhouses or agricultural experimenting centers, buildings or houses for living quarters, and in everything it refers to assistance of all kinds to be given to the peasants and their families and to the victims of the war against the dictatorship and their relatives." (App. 262a-263a)

Law No. 100 then proceeds to provide in its Article 1 that:

"The following departments of the Rebel Army are hereby created, to be assigned to the Ministry of Defense:

(1) Department of Technical, Material and Cultural Assistance to the peasant.

(2) Department of Construction of Peasants' Homes.

(3) Department of Reforestration.

(4) Department of Construction and Organization of Groups of Schools.

(5) Department of Commercial and Industrial Associations and Cooperatives for Consumption and Production of Agricultural Products.

(6) Department of Beaches for the People.

(7) Department of Assistance to War Victims and their Relatives." (App. 259a)

It was, therefore, early established that following the revolution the Rebel Army was to be converted from an instrument of revolutionary warfare to one of revolutionary reforms and reconstruction. It bears repetition that the declared intention of the law was "to engage the Rebel Army in creative tasks for the benefit of the citizenry, reaffirming in this manner their civic and not their military calling".

Law No. 600 of October 16, 1959, by which the "Armed Forces" were dissolved and the new "Revolutionary Armed Forces" were formed, contains the most striking proof of the non-military nature of the Rebel Army in post-revolutionary Cuba. After Law No. 600 extols the virtues of the Rebel Army in the most extravagant terms in its preamble (App. 269a), Article 9 of Law No. 600 provides that persons drafted into active service in the Armed Forces would, for purposes of seniority and retirement, receive credit for time "fighting against the dictatorship", time "served in the dissolved Army", time served as a political prisoner prior to December 31, 1958, etc.—but no credit for time served in the Rebel Army after January 1, 1959 (App. 271a-272a). In this manner it was officially made clear that after January 1, 1959 the Rebel Army was not engaged in a military capacity.

The proof of record concerning the actual work done by the Rebel Army in and after 1959 leaves little doubt of the "civic and not (the) * * * military calling" of the Rebel Army starting in January, 1959. In its principal aspects, the work of the Rebel Army after January, 1959, resembled the "incidents of a war economy", organized and directed by government, which were held not to be foreign government or military service for purposes of denationalization in *Kawakita* v. *United States*, 343 U. S. 717.

Not one witness or exhibit suggests that any combat duty was performed by the Rebel Army during the period

in issue. Marks testified that, starting in January, 1959, the Rebel Army was engaged in no maneuvers, no drills, and no training in combat duties (App. 121a-122a, 123a, 125a, 192a-193a). In this testimony he was corroborated by two witnesses offered by the Service (App. 200a-201a, 228a-229a). Marks also testified that men under his command constructed schools and cleared beaches (App. 176a-178a). The Service's witness, Gonzalez, testified on this score as follows:

> "Q. Would you describe the kind of work that the Rebel Army did after January, 1959? A. Well, one part is in the quarters, barracks, other parts are in labor battalions, building houses and building roads. Another part is in the agriculture—agrarian reform, land reform, reparation and river works." (App. 201a)

Another Service witness, de la Torre, testified on redirect examination that the Rebel Army was "engaged in work on reforestration", "construction work as relates to schools", planting trees, and building roads (App. 232a-233a). The attempt of the District Court to discount the significance of these post-January, 1959 functions of the Rebel Army by reference to the civilian and construction activities of the United States Army (203 F. Supp., at p. 394) fails, of course, to meet the issue raised by the proof here: the United States Engineering Corps performs its construction functions as an incident to its military activities and objectives; starting in January, 1959, pursuant to Castro's carefully conceived pattern of diverting the "free-spirited" and distrusted Rebel Army from military functions and power to enterprises less threatening to Castro's hegemony, the Rebel Army was engaged almost exclusively in reconstruction and police activities, and performed no typically military duties to which its "civic" functions were incidental or subordinate.

In the last analysis the armed forces of a state comprise that establishment which has the function of waging war. An armed force is, therefore, recognizable as a body of men engaged in either waging war or preparing to wage war. Uniforms, arms, commands, etc., are characteristic of various non-military as well as military agencies. Only waging war or preparing to wage war distinguishes an armed force. By these decisive criteria the respondent's proof here necessarily fails.

The Rebel Army waged no war from January 1959 to May 1960. And the totality of the respondent's proof of preparation for war by the Rebel Army during that period comes to the following:

> "*SIO to Witness Gonzalez*:
>
> Q. You haven't answered my question. I am interested in knowing whether you observed any members of the Rebel Army who did receive military instruction or did engage in military maneuvers after January 1st, 1959. A. I have seen soldiers in marching, training and also in parading.
>
> Q. When? A. That was in the first month of the revolution, to teach those Rebel soldiers who didn't know how to parade in military formation." (App. 245b)

> "Q. You continued. In what manner? A. [Ball-Llovera] When Fidel Castro took over, I had to wait in Operations for two or three months, and report every so often, then, after that, I was called as a teacher to the—in the—infantry, to the base of San Antonio de los Banos, known as the base of Cayuga. I was appointed by Captain Achiles Chinea.
>
> Q. What kind of appointment did you receive? A. Simply to teach the soldiers how to drill in close drill." (App. 249b)

The record reveals no further proof of activities by the Rebel Army after January, 1959 constituting preparation for war.

Marks' testimony that the Rebel Army engaged in no military maneuvers, drills, or training (App. 121a-122a, 123a, 125a, 192a-193a) was forefully corroborated by Service witnesses:

> "Q. Now, Mr. Gonzalez, during the period that you served in the Rebel Army, following January 1, 1959, did you ever engage in any combat duty? A. I can't talk about combat duty because there was no war.
>
> Q. Now, during the period after January 1, 1959, did he—and prior to the time that he left Cuba, did he ever engage—
>
> SIO: Excuse me, counsel—'you'—please.
> Counsel: Yes.
>
> *Counsel to Witness Gonzalez:*
>
> Q. Did you ever engage in any kind of maneuvers, military maneuvers? A. No, and I didn't even receive military instruction, training.
>
> Q. During the period after January 1959, did he ever engage in any kind of drills and—of a military nature? A. No, not me." (App. 200a)
>
> "Q. Did you personally ever engage in any combat duty after January 1, 1959? A. [de la Torre] After?
>
> Q. Yes. A. No, sir.
>
> Q. Did you ever engage in any military maneuvers? A. No, sir.
>
> Q. Did you ever engage in any military drills? A. No.
>
> Q. Did you get any military instruction? A. No." (App. 228a-229a)

We know of no instance of an armed force which does not train its men in the art of war. An armed force exists to wage war, and cannot serve its disinctive function if it does not prepare personnel and equipment for fighting. Here the issue posed was whether the Rebel Army was an armed force. The Service produced numerous witnesses

associated with the Rebel Army in an attempt to demonstrate an affirmative answer to the issue. Yet the record is wholly lacking in proof of the single, universal aspect of armies—training for war. This void is, of course, not the product of any oversight; it is, rather, a striking affirmation of the declaration of February 23, 1959 in Public Law No. 100 that after January 1959 the Rebel Army was assigned a "civic and not * * * [a] military calling" (App. 261a).

The conclusion of the District Court that the Rebel Army was the "Armed Force" of Cuba (notwithstanding the conclusive documentary evidence that the term "Armed Forces" was never identified with the Rebel Army) is based largely upon the indicia of military rank, insignia, identification cards, uniform, chain of command, pay, and arms. Even in these matters the record is unclear as to the existence of military forms—the issued uniforms were established as fatigues, better suited to laborers than soldiers, and on many occasions civilian clothes and not any uniforms were worn (App. 206a, 211a, 219a-220a); no single type of hat was issued or worn (App. 209a-210a); payment of salary was uncertain (App. 173a, 194a); duties were vague (see Ex. 1, Tr. 503-504); and the chain of command was unsettled (App. 122a, 125a). But the more serious error below on this matter was the uncritical deference to the alleged forms of the military perceived in the Rebel Army while disregarding the far more significant consideration that, starting in January, 1959, the work and functions of the Rebel Army were explicitly "civic and not * * * military." Just as neither rank, nor chain of command, nor uniform, singly or in combination, make the Boy Scouts, or the Salvation Army, or Police or Fire Departments the equivalents of an "Armed Force," so do those same characteristics fail to transmute the post January 1959 Rebel Army into a military establishment.

Nor can the post-revolutionary Rebel Army be considered as the body of men who would take to arms if war came. The state militia and not the peasant-formed Rebel Army was the post-revolutionary military force of Cuba. In any event, even if the Rebel Army was a reserve military body, the ruling in *United States* v. *Kenny*, 247 F. 2d 139, 143 (C. A. 2), establishes that a reserve force, such as the National Guard, is not an armed force.

All that has been said here concerning the Rebel Army generally has particular application to Marks' post-revolutionary Rebel Army duty and experiences. Without exception, starting in January, 1959, Marks' work consisted of police and security functions (App. 120a-126a, 154a-155a, 157a, 162a)—functions to which a pistol, a uniform, and a rank were all appropriate. There is no competent testimony that Marks engaged in any activity typical of military establishment—there was no military action, training or instruction; no maneuvers or drills, no salutes; and only the most meagre semblance of a uniform.[7] Whether serving as a prison officer, or a rural guard, or a security officer, Marks was at no time engaged in a function directly or indirectly related to the waging or preparation for the waging of war.

The record here demonstrates a total absence, on and after January 2, 1959, of service by Marks in a military

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[7] The Service and apparently the Courts below relied heavily upon an article in the December, 1960 issue of "Cavalier" magazine, to establish that Marks had made admissions therein of service in an armed force. Much of the language of the Court of Appeals purporting to describe petitioner's activities comes from that article. It should be noted that the article was not offered and was not admitted for such purpose, the Service having refused to offer the article for the truth of its contents (App. 180a-185a). Marks pointed out that the article was not in the form he had originally approved (App. 183a). In any event, while the article refers to certain military forms, it does not establish the military activity necessary to the respondent's case.

organization or the performance of military service. But if the record is not as clear on this score as we maintain, then it must be remembered that the burden of proving that Marks' post-January 1959 activity was military in nature rests with the respondent, and that that burden must be met by clear, convincing, unequivocal, and even overwhelming proof. See, *e.g.*, *Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3). Such a burden has patently not been sustained. If no more than the official documents, Laws No. 100 and No. 600, be read, serious doubts must be acknowledged as to whether the Rebel Army was engaged in military and not civic functions. And since " 'Rights of citizenship are not to be destroyed by an ambiguity' " (*Kawakita* v. *United States*, 343 U. S. 717, 728), all doubts on this issue must be resolved in favor of Marks [*Kenji Kamade* v. *Dulles*, 145 F. Supp. 457, 458-459 (D. Cal.) (Weinfeld, J.)]. The failure of the Courts below to do so is in conflict with the decisions of this Court.

V

The finding of the Court below that the petitioner, if an alien, is deportable raises substantial and unsettled issues of constitutional and federal law.

It will be recalled that the petitioner was arrested and detained as an alien allegedly deportable on the grounds that he was excludable because of his conviction in 1952 of a crime involving moral turpitude and, further, because at the time of his entry into the United States in July, 1960 he did not possess the entry documents required of an alien. The District Court rejected both grounds; the Court of Appeals sustained the second and did not consider the first.

A.

The ruling below assumes, of course, the power of government to deport a native-born American rendered state-

less in the absence of an express renunciation of American citizenship or allegiance. Such a power to banish has never heretofore been sustained in American jurisprudence. To the contrary, in that portion of the dissenting opinion of Chief Justice Warren in *Perez* v. *Brownell*, 356 U. S. 44, which was not controverted in the majority opinion, the Chief Justice pointed out:

> "Even if Congress can divest United States citizenship, it does not necessarily follow that an American-born expatriate can be deported * * *. Since the deporting power has been held to be derived from the power to exclude, *Fong Yue Ting* v. *United States*, *supra*, it may well be that this power does not extend to persons born in this country. As to them, deportation would perhaps find its justification only as a punishment, indistinguishable from banishment. See dissenting opinions in *United States* v. *Ju Toy*, 198 U. S. 253, 264; *Fong Yue Ting* v. *United States*, *supra*, at 744." (356 U. S., at p. 65, n. 6)

It is, accordingly, the petitioner's basic premise that there is no power to deport Marks even if he be deemed to have been denationalized.

B.

The law governing the requirement of entry documents of a citizen subsequently denationalized is set forth fully in *Matter of W*, 5 I & N Dec. 759. That case establishes that the relation-back doctrine in the instance of denationalization is inapplicable to documentary matters. The rationale is clear: one who is a citizen at the time of entry, though subsequently denationalized for reasons dating back prior to the entry, obviously cannot be required to obtain and possess at the time of entry the entry documents required of aliens. Until denationalized, the citizen could not have known he was an alien and could not have been expected to apply for papers issued to aliens.

Thus, in *Podea* v. *United States*, 179 F. 2d 306 (C. A. 2), where the native-born American of Roumanian parents

had served in the Roumanian Army, it was held that his failure to come to the United States as an immigrant prior to induction in the Roumanian Army was no grounds for expatriation, Judge A. N. Hand saying that if the petitioner had so assumed immigrant status

> "* * * he might have had to meet the claim that he had conceded Roumanian citizenship and be confronted by a concession of serious if not fatal character." (179 F. 2d, at p. 309.)

The foregoing principle has direct application here. At least until the proceeding in the Immigration Service was at an end, there can have been, and there was, no competent determination that Marks was expatriated. The State Department notification to Marks of denationalization, which was not preceded by notice or hearing, was, of course, no such determination. In fact, the Hearing Officer at the immigration hearing, declared that the State Department action is "not binding in this proceeding" and "not an adjudication of the man's alienage or citizenship" (App. 42a-44a), and the Examining Officer consented to offering the State Department notice for the limited purpose of proving "that the respondent has been served with such a certificate, without offering it for any binding effect as to the finding there contained" (App. 53a). Consequently, at the time of his entry into this country on July 22, 1960, Marks could not have sought or obtained entry documents as an alien without acknowledging an expatriation which had not then been competently determined or established. *Matter of W*, *supra*, settles that in such circumstances there is no excludability for lack of entry documents.

The Court of Appeals held, however, that the effect of § 349(a)(3) is to denationalize immediately upon the occurrence of the prescribed event thereby rendering the petitioner an alien for all purposes from the date of such event —a conclusion which would render him an alien (at least as

of July, 1960) so as to require entry documents.[8] The short answer to this contention is that the statute does not specify that denationalization shall take effect immediately upon the prescribed event. It is, moreover, settled that, as a native-born American, the petitioner's loss of citizenship can only be established by a judicial determination of his alienage; admittedly such a determination is a jurisdictional prerequiste to any action based upon such alienage. (*Ng Fung Ho* v. *White*, 259 U. S. 276; see also authorities and discussion at pp. 38-39, *supra*). Accordingly, until a judicial declaration of his alienage, Marks' American citizenship was unimpaired for purposes of any administrative action, including the requirement of entry documents which only aliens need procure. The principle of *Ng Fung Ho* obliterates—and for constitutional reasons—the argument that at the time of his entry into the United States in July, 1960 Marks was required to concede and act as if he were an alien rather than a citizen.

The impact of the foregoing authorities is not avoided by the language of § 356 of the Immigration & Nationality Act of 1952 (8 U. S. C. A. 1488) cited by the Court of Appeals. § 356 provides that loss of nationality "shall result solely from the performance" of any of the prescribed denationalizing acts. This is read by the Court of Appeals to mean that denationalization "shall result immediately upon the performance" of any of the foregoing acts. § 356 does not lend itself to such construction. Its meaning is, rather, as indicated in *Kawakita* v. *United States*, *supra*, at pages 730-731, "that the only methods of expatriation are those contained" in the denationalization statutes.

---

[8] It is not clear which entry documents would have been required of Marks or which he could have obtained. In any event, since the respondent contends that Marks was excludable by reason of his prior conviction, it is clear that if Marks had attempted to obtain entry documents as an alien in July, 1960 he would have been excluded and thereby forced to litigate his claim of citizenship from abroad.

C.

Excludability of an alien for a prior conviction involving moral turpitude is authorized by § 212(a)(9). That section, however, applies to "*aliens* who have been convicted" of such a crime. Marks' conviction occurred in 1952 when he was a citizen, and prior to the occurrence of any of the allegedly expatriating events. § 212(a)(9) is, therefore, here inapplicable.

A fair reading of § 212 in its entirety evidences the congressional intention that those provisions of excludability which refer to aliens shall apply only to the acts and qualities of aliens *qua* aliens. § 212(a)(22) confirms this analysis. It is there provided that excludability shall extend to

> "Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrant aliens and who seek to reenter the United States as nonimmigrants."

The marked difference in the manner in which § 212(a)(22) refers to "persons" denationalized for draft evasion as compared with "aliens" confirms that § 212(a)(9) concerns conviction of an alien while an alien. The Service is, therefore, unwarranted in charging petitioner to be excludable for a conviction at the time he was concededly a citizen.

Doubts on the argument under this point are resolved in Marks' favor by *Mangaoang* v. *Boyd*, 205 F. 2d 553 (C. A. 9), *cert. den.*, 346 U. S. 876. It was there proposed to deport for membership in the Communist Party pur-

suant to 8 U. S. C. A. 1182(28)(c) ("Aliens who are members of or affiliated with * * * the Communist Party of the United States"). The proof showed that the alleged Communist Party membership occurred while Mangaoang was a citizen of the United States, and that such membership terminated before he lost his United States citizenship as a result of the proclamation of Philippine Independence in 1946. In these circumstances, it was held that the alien was not deportable for his alleged Communist Party membership, the Ninth Circuit saying:

> "* * * We think it was not sufficient to prove that the appellant was an alien at the time of his arrest and that he was a member of the Communist Party at some prior date on which he was not shown to have been an alien." (205 F. 2d, at p. 555)

United States ex rel. Eichenlaub v. *Shaughnessy*, 338 U. S. 521, is not to the contrary. In *Eichenlaub* naturalized citizens, whose citizenship was later revoked and cancelled *ab initio* for fraud in the procurement, were held to be deportable for convictions sustained during the period of the fraudulent naturalization.[9] In writing the opinion for the Court, Mr. Justice Burton expressly stated that the case did not involve the questions which would arise in the instances of the loss of citizenship "by lawful and voluntary expatriation" (338 U. S., at p. 528 n. 14). This reservation is here highly significant in view of the contention made by Mr. Justice Frankfurter in his dissent that the decision would have serious implications with respect to citizens who might be denaturalized for reasons such as voting in a foreign election or serving in the armed forces of a foreign state (see 338 U. S., at p. 535). It is, therefore, unquestionable that the Court in *Eichenlaub* expressly withheld passing upon the issue

[9] This decision was not that of a majority of the Court since two Justices did not participate in the decision and three dissented.

as raised in the instant case. The authorities and the reasons cited herein remain intact and unimpaired by *Eichenlaub*, and dictate that Marks' conviction while a citizen constitutes no basis for deportation.

CONCLUSION

The petition for a writ of certiorari to the Court of Appeals should be granted.

Respectfully submitted.

MURRAY A. GORDON,
Attorney for the Petitioner.

APPENDIX

Opinion of United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 170—October Term, 1962

(Argued December 11, 1962 Decided April 9, 1963)

Docket No. 27557

—o—

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,
Relator-Appellant-Appellee,

v.

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,
Respondent-Appellee-Appellant.

—o—

Before:

WATERMAN, SMITH and HAYS, *Circuit Judges.*

On appeal in habeas corpus proceeding, native-born American relator appeals from judgment, United States District Court for the Southern District of New York, Cashin, J., that he is now an alien, and respondent District Director of the Immigration and Naturalization Service appeals from judgment that relator is not a deportable alien and from the granting of the writ.

Judgment of alienage affirmed, judgment that relator is not deportable reversed, and cause remanded with instructions that the writ be dismissed.

MURRAY A. GORDON, New York City, *for Relator-Appellant-Appellee.*

VINCENT L. BRODERICK, U. S. Atty., S. D. N. Y. (Roy Babitt, Spec. Asst. U. S. Atty., of counsel), *for Respondent-Appellee-Appellant.*

WATERMAN, *Circuit Judge*:

Herman Frederick Marks was born in Milwaukee, Wisconsin, on August 1, 1921. In 1958 he went to Cuba and there joined Fidel Castro's revolutionary forces fighting in the Sierra Maestra Mountains to overthrow the government of Fulgencio Batista. After the revolution was brought to a successful conclusion in January 1959, Marks continued to serve as a captain in the Cuban Rebel Army. He was placed in command of some 7,000 to 8,000 men charged with the security of La Cabana, a military prison and fortress in Havana. There he presided over the execution of numerous prisoners condemned to death by military tribunals. Later he was assigned to give instructions on the use of weapons at a military police school and at Principe Prison, where he again commanded a unit of security guards.

In May 1960, Marks, having lost favor with the Castro regime, left Cuba and in July of that year re-entered the United States.

In January 1961, Marks was arrested by officers of the Immigration and Naturalization Service. The Attorney General commenced deportation proceedings against him

charging that, pursuant to 8 U. S. C. § 1481(a)(3),[1] he had lost his American citizenship by serving in the armed forces of a foreign country without authorization of the Secretary of State and the Secretary of Defense; and, that being an alien, he was a deportable one, 8 U. S. C. § 1251(a)(1), as he had been convicted in 1951 of a crime involving moral turpitude, 8 U. S. C. § 1182(a)(9), and as he had entered the United States, upon his return from Cuba, without appropriate alien documents. 8 U. S. C. § 1182(a)(20).

After a hearing before a Special Inquiry Officer of the Immigration and Naturalization Service, Marks was ordered deported on the grounds set forth above. The Board of Immigration Appeals sustained the order of deportation.

Marks thereupon petitioned the United States District Court for the Southern District of New York for a writ of habeas corpus, challenging (1) his alleged loss of citizenship, and thus the jurisdiction of the Attorney General in the prior administrative deportation proceedings; (2) his deportability under 8 U. S. C. §§ 1251(a)(1), 1182(a)(9) and 1182(a)(20), even should he be determined to be an alien; and (3) the lawfulness of his detention, should he be declared to be legally deportable, as he would then be stateless and thus not actually deportable to Cuba or to any other country.

---

1 Section 349 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1481, provides in material part:

"(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

* * *

(3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense * * *"

After a hearing upon the issues so raised, the district judge ruled that Marks had lost his American citizenship by virtue of serving in the armed forces of Cuba after the successful conclusion of the Castro revolution. Marks appeals from that determination, claiming, as he did below, that the Rebel Army did not constitute the "armed forces of a foreign state", within the meaning of 8 U. S. C. § 1481(a)(3), that his service in the Rebel Army during 1959 and 1960 was involuntary, and that § 1481(a)(3) as here applied is unconstitutional in that it imposes a cruel and inhuman punishment in violation of the Eighth Amendment. Although we find great force in the constitutional arguments presented by relator's counsel, we are constrained by the superior authority of *Perez* v. *Brownell*, 356 U. S. 44 (1948), to affirm the determination of alienage on the opinion of Judge Cashin, the district judge below, 203 F. Supp. 389 (1962).

Despite his determination adverse to the relator on the issue of alienage, Judge Cashin granted the writ of habeas corpus relator sought, for he held that Marks was not deportable under either 8 U. S. C. § 1182(a)(9) or 8 U. S. C. § 1182(a)(20), the provisions relied upon by the Attorney General in the prior deportation proceedings.[2] We hold that the determination of the district court was erroneous in this respect and that the order of deportation was valid.

---

2 Having ruled that the order of deportation was invalid, Judge Cashin did not reach the relator's third contention, that his detention was unlawful on the ground that no country would accept him as a stateless deportee and therefore that he was not, in fact, deportable. Marks, who is now at liberty on a bond of $5,000, does not raise the question of his actual deportability upon these cross-appeals. Our disposition of these appeals is, of course, without prejudice to a renewal of that contention upon a new petition for a writ of habeas corpus, should the Attorney General again take the relator into custody.

Section 241 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1251, provides, in material part, that

> "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—
>
> "(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;"

Section 212(a)(20) of the same Act, 8 U. S. C. § 1182 (a)(20), provides for the exclusion from the United States of any alien immigrant

> ". . . who at the time of application for admission is not in possession of a valid unexpired visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter . . ."

It is conceded that Marks possessed none of the documents required of entering alien immigrants at the time of his return to the United States from Cuba in July 1960. Though he had been served with a certificate of loss of American citizenship, he effected entry as a returning native-born citizen who did not need the documents required of alien immigrants. The district judge ruled, however, that §§ 1251(a)(1) and 1182(a)(20) were inapplicable to the novel facts of this case, for he held that inasmuch as, prior to Marks' reentry in 1960, there had been no adjudication of his alienage in any judicial proceeding, no competent determination of Marks' alienage had been made at the time of his entry.

It is clear that when an alleged alien claims United States citizenship and supports his claim by substantial

evidence, he is entitled by the due process clause of the Fifth Amendment to have his American citizenship *vel non* determined by a judicial tribunal. *Ng Fung Ho White*, 259 U. S. 276 (1922); *Perez* v. *Brownell, supra; Kessler* v. *Strecker*, 307 U. S. 22 (1939). It is equally clear that Congress sought by the enactment of Section 356 of the Immigration and Nationality Act of 1952, 8 U. S. C. § 1488, to have loss of nationality occur immediately upon the commission of expatriating acts:

> "The loss of nationality under this Part shall result solely from the performance by a national of the acts or fulfillment of the conditions specified in this Part."

See Hearings Before the Committee on Immigration and Naturalization on H. R. 6127, House of Representatives, 76th Cong. 1st Sess. (1940) at 504; *Kennedy* v. *Mendoza-Martinez*, U. S. , 83 S. Ct. 554 (1963). To accommodate the intent of Congress, therefore, Judge Cashin's determination of alienage must be interpreted to relate to the time of Marks' service in Cuba's Armed Forces unless such an application of § 356 is constitutionally prohibited.

We find no such prohibition. Were deportation under 8 U. S. C. §§ 1251(a)(1) and 1182(a)(20) a punishment for entry into the country in knowing violation of alien documentation requirements, the imposition of such a penalty based upon a post-entry determination of alienage would surely involve fundamental unfairness. Deportation under these statutory provisions is not a penalty for wrongdoing, however, but is rather the delayed exercise of the congressional power to exclude aliens from entry into the United States.

If Marks lost his American citizenship by virtue of service in the Cuban Armed Forces, as we are constrained

to hold that he did, he became an alien in 1959 at the time the expatriating acts were committed, not at the time his alienage was judicially determined. Marks thereafter entered the United States without the documentation required of alien immigrants and is, on that ground, subject to deportation under 8 U. S. C. §§ 1251 and 1182(a)(20).[3]

The judgment of the district court is reversed, and the cause is remanded with instructions that the writ of habeas corpus be dismissed.

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3 Because of our determination that the order of deportation was valid under § 1182(a)(20), we do not reach the question whether Marks was also deportable under 8 U. S. C. § 1182(a)(9), as the Attorney General contends, by virtue of a prior criminal conviction.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 253

HERMAN FREDERICK MARKS, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 73-79) is reported at 315 F. 2d 673. The opinion of the district court is reported at 203 F. Supp. 389.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1963. The petition for a writ of certiorari was filed on July 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's service in the Cuban Rebel Army after the Castro government became the official government of Cuba was voluntary service in the armed forces of a foreign state.

2. Whether Section 349(a)(3) of the Immigration and Nationality Act of 1952, providing for the expatriation of a native-born citizen who voluntarily serves in a foreign army without authorization, is constitutional.

3. Whether petitioner, who had been notified that he had lost United States citizenship by reason of unauthorized service in a foreign army, may be deported for entering the United States furtively without obtaining the documents required of entering alien immigrants.

4. Whether petitioner was denied a proper judicial determination of his alienage.

STATUTES INVOLVED

The Immigration and Nationality Act of 1952, 66 Stat. 163, provides in pertinent part:

> Section 349 [8 U.S.C. 1481]:
>
> (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> * * * *
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically au-

thorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

Section 212 [8 U.S.C. 1182]:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States;

* * * *

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(e);

* * * *

STATEMENT

Petitioner was born in Milwaukee, Wisconsin, in 1921 (P.A. 50). In 1958, he joined Fidel Castro's revolutionary forces in Cuba and fought (as an officer) to overthrow the Batista government until late 1958, serving at times under the command of

Che Guevara. In November 1958, he came back to the United States (G.A. 80-86).

On January 1, 1959, the Castro government became the official government of Cuba (G.A. 299). During the first week of January 1959, petitioner returned to Cuba. Upon his arrival, he sought out the group with whom he had previously served and reported to Che Guevara (G.A. 88-89). The next day, Che Guevara assigned petitioner the post of security officer at La Cabana in Havana, identified by petitioner himself as a military and political prison. Petitioner held the rank of Captain. He was in charge of the execution of numerous persons condemned to death by revolutionary tribunals and in command of the guards at the prison (G.A. 56-57, 93, 96-102, 183-187, 133, 308-311). Petitioner and the men under him wore the uniforms of the Rebel Army (G.A. 95, 175-177, 189-192). In June 1959, petitioner was transferred and given various assignments of duty, principally as an officer in charge of guard duty (G.A. 58-61). In January 1960, he was made the security officer at the Principe Prison (G.A. 61-62). While petitioner was in Cuba, he was paid by the Rebel Army and was issued its identification card (G.A. 108-109, 208-213). He had freedom of movement in his off-duty hours (G.A. 121-122). Petitioner saw the American Consul in Havana frequently but never discussed his status with that official (G.A. 58, 62, 116). In February 1960, a certificate of loss of nationality was served upon petitioner by an official of the United States Embassy in Havana (G.A. 117-118). In July, 1960, petitioner entered the United

States at El Paso, Texas, without an immigration visa or document in lieu thereof (P.A. 18, 50).

In January 1961, petitioner was arrested and deportation proceedings were commenced against him. The government asserted that he had lost his citizenship by serving in the Cuban Army without authorization, and that he was a deportable alien because he had entered the United States without proper documents and because he had been convicted in 1952 of a crime involving moral turpitude (P.A. 17-21). At the hearing, the above facts with respect to petitioner's military service and entry without documentation were adduced. Petitioner claimed that he returned to Cuba in January 1959 for a reunion with friends and to obtain land that he expected in return for his participation in the revolution (G.A. 87-88, 134-135). He said that he accepted his assignment in the Rebel Army because of fear of Che Guevara (P.A. 151-153). The special inquiry officer found that petitioner was an alien at the time of his entry in 1960 and was deportable on the ground that he entered without documentation. He also held that he was excludable as one convicted of a crime involving moral turpitude. The Board of Immigration Appeals sustained the order of deportation (G.A. 366-378).

Petitioner then filed a habeas corpus petition in the United States District Court for the Southern District of New York (P.A. 5-17). It was stipulated that the transcript of the hearing before the special inquiry officer would be considered as the testimony in the case (P.A. 30-33). The district court ruled that petitioner had lost his citizenship but that he

could not be deported. 203 F. Supp. 389. Upon cross-appeals, the court of appeals held that petitioner was no longer a citizen and that he could be deported as an alien who entered without documentation. The court found it unnecessary to consider whether petitioner was also deportable because of his conviction for crime. 315 F. 2d 673.

ARGUMENT

1. Section 349(a)(3) of the Immigration and Nationality Act (*supra*, p. 2) provides that a United States national shall lose his nationality by serving in the armed forces of a foreign state without the authorization of the Secretary of State and the Secretary of Defense. There is no merit in petitioner's claim that his service in the Cuban army after Castro assumed power in 1959 was involuntary and did not constitute service in a foreign army. Unlike the petitioner in *Nishikawa* v. *Dulles*, 356 U.S. 129, petitioner was not conscripted into military service. He was in the United States when the new regime came into power. He choose to return to Cuba where he sought out his former unit and reported to his former superior officer, Che Guevara. He accepted a command position with the rebel army the day after his arrival in the country. He did not protest this assignment either to Che Guevara or to American consul whom he saw frequently. The failure to make even a mild objection to his service refutes the claim that he acted under compulsion of Che Guevara's orders. Petitioner, moreover, showed no reluctance in the performance of his duties. That this claim of duress in an afterthought is borne out by

petitioner's own account of his service, written prior to the institution of deportation proceedings, which makes no mention of duress (G.A. 208).

Contrary to petitioner's contention (Pet. 53-66), the Rebel Army was part of the armed forces of Cuba. Witnesses at the hearing before the special inquiry officer testified that it was the only army left in Cuba after January 1, 1959, and that the regular army which had existed under Batista was integrated into the Rebel Army (G.A. 51, 54, 265-270). While it is true that the Rebel Army was assigned functions of a non-military nature, a part of this army "was in the quarters with their arms" (G.A. 235). In October 1959, Cuban Law 600 explicitly declared that "members of the Rebel Army and other persons at present rendering real and effective service in any of the Armed Forces of the Nation, shall retain their military status" (P.A. 270-271).

2. Congress has the power to divest of American nationality citizens who perform unauthorized military service for a foreign state.

a. The power of Congress to enact this legislation follows, *a fortiori*, from *Perez* v. *Brownell*, 356 U.S. 44. In that case, this Court upheld the power of Congress, under its foreign relations power, to impose loss of nationality for voting in a foreign political election, finding it reasonable for Congress to conclude that such voting might jeopardize the successful conduct of foreign affairs.

It is not debatable that serious problems in the conduct of foreign relations may be created by military service in a foreign army. Such service, for ex-

ample, may be viewed as tacit military aid to the foreign state and lead to grave international complications. It may also cause a dispute between two nations over the military service of an individual. In all circumstances where the statute is operative, there is involvement with a foreign state. It was reasonable for Congress to regulate this problem by withdrawing citizenship from those who take it upon themselves to affect foreign relations by joining foreign armies without governmental permission.

b. Apart from the question of embarassment to the conduct of foreign affairs, we submit that Congress has plenary power over the citizenship of those who have transferred their allegiance. Entry into a foreign army is an outward manifestation of allegiance to the foreign state n significantly different from taking an oath of allegiance to a foreign power. By joining the Cuban army, petitioner placed himself under the dominion of the Cuban government through its control of his superior officers, whose orders he was duty bound to follow. He thus implicitly swore allegiance to Cuba. This course of action, unauthorized by the American government, may reasonably be considered incompatible with continued allegiance to this country, constituting an abandonment of citizenship.

c. Unlike *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, and *Trop* v. *Dulles*, 356 U.S. 86 where the aim of the statute was found to be additional punishment (for draft evasion and for desertion, respectively) the history of section 349(a)(3) indicates no purpose to impose punishment. Its essential history is

set forth in *Perez* v. *Brownell*, 356 U.S. 44. In brief, prior to the Nationality Act of 1940, nationality could be lost by service in a foreign army if an oath of allegiance was required. In its preliminary draft of the 1940 Act, the Cabinet Committee recommended that nationality be lost by service in the armed forces of a foreign state when not expressly authorized by United States laws. The Committee considered that such foreign military service was a transfer of allegiance to the foreign state.[1] The 1940 Act, as passed, 54 Stat. 1137, provided for loss of nationality for foreign military service when the person had or acquired the foreign nationality. The present Act eliminated this condition, adopting the recommendation of the earlier Cabinet Committee. Its object was to make loss of nationality equally applicable to all persons who serve in foreign armies, treating native born and naturalized citizens alike and eliminating dependency upon foreign law. See S. Rep. No. 1515, 81st Cong., 2nd Sess., p. 749. This history indicates both a Congressional purpose to act under its foreign affairs power and a recognition that service in a foreign army is a transfer of allegiance to the foreign power.[2]

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[1] The Committee reported (H.R. Comm. Print., Pt. 1, 76th Cong., 1st Sess. pp. 66-67): "This provision is based upon the theory that an American national who, after reaching the age of majority * * * voluntarily enters, or continues to serve in, the army of a foreign state, thus offering his all in support of such state, should be deemed to have transferred his allegiance to it. * * *"

[2] Petitioner quotes from a cabinet committee report (Pet. 15-16). The full paragraph from which he quotes a portion

d. Nor does the fact that petitioner has become stateless render the statute unconstitutional in its application to him or compel a construction which would require a verbal renunciation of American citizenship. In amending the statute, Congress eliminated the condition that loss of American nationality would be noted only if a foreign nationality remains or is acquired. The statute gave full notice that voluntary service in a foreign army would resul in a loss of America citizenship. Petitioner thus lost United States nationality when he voluntarily served in the Cuban army without authorization of the American government. By this act he also expressed allegiance to Cuba, whether or not under Cuban law he acquired, or could have acquired, Cuban citizenship. Petitioner's present situation is the outcome of his difficulties with the nation in whose army he chose to serve; that he now regrets his choice does not serve to make the statute invalid.

3. Petitioner does not dispute the proposition that he entered the United States at El Paso in July 1960, without the documents required of entering aliens by

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is as follows:

"None of the various provisions of the Code concerning loss of American nationality, such as those applicable to children born abroad to parents only one of whom has American nationality and persons who, after obtaining American nationality through naturalization, establish a residence abroad, is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States." H.R. Comm. Print, Pt. 1, 76th Cong., 1st Sess. p. VII.

section 212(a) of the Immigration and Nationality Act of 1952. He contends, however, that until there was a judicial determination that he was expatriated, he had a right to ignore the certificate of loss of nationality and to enter the United States as a citizen (Pet. 66-69).

Section 212 of the 1952 Act (*supra*, p. 3) provides that an alien shall be excluded from entry into the United States unless he possesses certain documents. The language covers a former citizen who has lost his nationality. The issue, then, is the time when citizenship is lost. The answer is that Congress, in section 356 of the 1952 Act, declared that nationality is lost "solely from the performance by a national of the acts or fulfillment of the conditions" which it has specified. In petitioner's case, he lost his citizenship when he took up service in the Cuban Army and thereby transferred his allegiance to Cuba.

This did not deprive petitioner of judicial remedy. Petitioner could have applied for a certificate of identity and requested admission to the United States under such certificate. If he was refused entry, he could have filed a petition for habeas corpus and obtained a determination of his citizenship. Alternatively, petitioner could have filed an action abroad for a declaratory judgment that he is a citizen. *Rusk* v. *Cort*, 369 U.S. 367. Petitioner, knowing that he was deemed an alien, did not present himself and claim citizenship. He entered surreptiously. He is in no position to complain that, on a judicial determination that he is an alien, he is placed in the same position as any other alien who enters in like manner.

4. Petitioner also complains of his administrative arrest and subsequent detention prior to the judicial determination that he had lost his citizenship. But petitioner was not denied a right to a judicial determination prior to administrative action. He could have instituted an action for a declaration of citizenship in the six months period from the time he entered the United States in July 1960 until his arrest in January 1961. Since he failed to use this opportunity, there is no reason why he should not be subject to administrative action.

CONCLUSION

For the forgoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 253

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,

Petitioner,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

BRIEF FOR PETITIONER

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IN THE

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No. 253

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HERMAN FREDERICK MARKS,

Petitioner,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

BRIEF FOR PETITIONER

Opinions Below

The opinion of United States District Judge Cashin for the Southern District of New York is reported at 203 F. Supp. 389. An earlier decision of United States District Judge Levet of that same Court in a related aspect of this proceeding is reported at 198 F. Supp. 40. The opinion of Circuit Judge Waterman of the United States Court of Appeals for the Second Circuit, which affirmed in part and reversed in part the determination of Judge Cashin, is reported at 315 F. 2d 673.

Jurisdictional Statement

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit was granted by this Court on October 14, 1963. 375 U. S. 810.

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

Questions Presented

Petitioner is a native-born American who has never renounced his American citizenship [*cf.* § 349[1] (a) (6), (7)], never taken an oath of allegiance to a foreign state [*cf.* § 349(a)(2)], and never acquired the citizenship or nationality of another state [*cf.* § 349(a)(1)]. Nor is it charged that he ever voted in a foreign election [*cf.* § 349 (a)(5)], or served in the employ of a foreign state of which he was a national [*cf.* § 349(a)(4)]. It was held below, however, that petitioner forfeited his American citizenship, rendering him stateless and deportable from the United States, because he was "a member of the Armed Forces of Cuba from January 2nd, 1959, to May, 1960", a charge presumably based upon the statutory provision that citizenship is lost by "entering, or serving in, the armed forces of a foreign state" without the written authorization of the Secretaries of State and Defense[2] [§ 349(a)(3)].

The issues raised in this first instance of review by this Court of an adjudication of denationalization, statelessness, and deportability of an American-born are the following:

1. Whether § 349(a)(3), as here applied, is a penal statute and therefore unconstitutional because it imposes

[1] Sections 241, 242 and 349 of the Immigration and Nationality Act of 1952 are fully set forth at pages 4-7 and are hereinafter referred to as "§ 241", "§ 242", and "§ 349" respectively.

[2] While § 349(a)(3) refers to entry or service in the armed forces of a foreign state, membership in the Cuban Armed Forces and not entry or service in such armed force is charged here.

the cruel and inhuman punishment of statelessness prohibited by the Eighth Amendment (*Trop* v. *Dulles*, 356 U. S. 86) and because it imposes such punishment without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments (*Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144; *Wong Wing* v. *United States*, 163 U. S. 228).

2. Whether § 349(a)(3), as here applied, is an unconstitutional impairment of the petitioner's status as a citizen of the United States pursuant to Amendment XIV, § 1, in that he has never renounced his sole American citizenship by declaration or act.

3. Whether the administrative arrest and administrative detention of the petitioner by the respondent for a period of approximately nine months in connection with petitioner's possible deportation is an improper and unconstitutional exercise of the judicial power which is vested solely in the judiciary pursuant to Article III.

4. Whether petitioner's service in the Cuban Rebel Army from January 2, 1959 to May, 1960, which initiated pursuant to the order and directive of a powerful Cuban authority and continued subject to punishment for desertion or counter-revolutionary activity, was voluntary within the meaning of *Nishikawa* v. *Dulles*, 356 U. S. 129.

5. Whether the petitioner's service in the Cuban Rebel Army after January 2, 1959, during a period when that organization was not designated as an "armed force", and was neither engaged in nor preparing for military activities, but was explicitly assigned to and carrying out a "civic and not [a] * * * military calling", constituted service in the armed forces of a foreign state within the meaning of § 349(a)(3).

6. Whether petitioner, if he is an alien, is deportable as an excludable alien because when he returned to this

country in July, 1960, and before his alienage had been competently determined or established, he did not obtain the entry documents required of an alien.

7. Whether petitioner, if he is an alien, is deportable as an excludable alien, pursuant to the statutory provision which renders excludable aliens convicted of crimes involving moral turpitude, because the petitioner had been convicted of such a crime in 1952 while he was a citizen.

Applicable Constitutional and Statutory Provisions

1. United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

2. Immigration and Nationality Act § 349(a)(3), Act of June 27, 1952, c. 477, Title III, Ch. 3, § 349(a)(3), 66 Stat. 267, 8 U. S. C. A. 1481(2)(3) (referred to herein as "§ 349(a)(3)"):

> "(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense."

3. Immigration & Nationality Act § 241(a)(1), Act of June 27, 1952, c. 477, Title II, Ch. 5, § 241(a)(1), 66 Stat. 204, 8 U. S. C. A. 1251(a)(1) (referred to herein as "§ 241(a)(1)"):

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry:"

4. Immigration & Nationality Act § 212(a)(9), (20), Act of June 27, 1952, c. 477, Title II, Ch. 2, § 212(a)(9), (20), 66 Stat. 182, 8 U. S. C. A. 1182(a)(9), (20) (referred to herein as "§ 212(a)(9)" and "§ 212(a)(20)"):

"(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * *

(9) Aliens who have been convicted of a crime involving moral turpitude

* * *

(20) Except as otherwise specifically provided in this chapter, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this chapter, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 1181(c) of this title;"

5. Immigration & Nationality Act § 242, Act of June 27, 1952, c. 477, Title II, Ch. 5, § 242, 66 Stat. 208, 8 U. S. C. A. 1252 (referred to herein as "§ 242"):

"(a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $ 00 with security approved by the Attorney General, containing such

conditions as the Attorney General may prescribe; or (3) be released on conditional parole".

"(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present.

No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other

law or treaty, the decision of the Attorney General shall be final."

"(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section."

Statement of the Case

There have been many controverted issues of fact in this proceeding. Petitioner's view of the controverted aspects of the record is reserved for the argument which follows. At this point the facts not contradicted in the record are summarized:

Marks was born in Milwaukee, Wisconsin, on August 1, 1921 (R. 119a). In 1958 he went to Cuba (R. 141a). The Cuban civil war was in progress at that time. Marks ultimately joined the rebel forces led by Castro and attained the rank of captain in the Rebel Army (R. 145a). Although eligible to do so as a result of his service in the Rebel Army (R. 263a-267a), Marks never acquired Cuban nationality (R. 119a, 120a, 140a) or otherwise renounced his American citizenship, and promptly protested when notified that his American citizenship was in question

because of his service in the Rebel Army (R. 127a-128a, 282a-284a).

Sometime in November 1958, Marks was obliged to obtain medical treatment for injuries he sustained, and it was necessary for him to go to Florida for that purpose (R. 148a-150a). Marks returned to Cuba during the first week of January, 1959 (R. 150a); in the interim, the rebel forces had occupied Havana, Batista had fled, and the hostilities had ended.

Upon his return to Cuba, Marks was directly assigned by Che Guevara, one of the leading revolutionaries in the rebel forces, to perform security duties at La Cabana, a prison in Havana (R. 152a-155a). Thereafter, starting in June 1959, Marks served in various other assignments in his capacity as a captain in the Rebel Army, but his duties and authority were diminished as he increasingly engaged in anti-communist activity (R. 122a-126a). That activity finally reached such proportions that by May 1960, Marks, fearing his imminent arrest as a counter-revolutionary by the Cuban secret police, escaped from Cuba and ultimately arrived in the United States in July 1960 (R. 132a-134a).

On January 25, 1961, Marks was interviewed by two investigators of the Immigration and Naturalization Service at his apartment. According to Marks, they stated they were interested in information and cooperation which might "help them in dealing with the Cuban situation" (R. 135a). Marks was brought to the offices of the Service that night where, after approximately five hours of interrogation (R. 67a-70a), he signed a sworn statement dealing with his alleged activities in Cuba (R. 59a-61a). The statement was drafted in the handwriting and language of one of the investigators (R. 241a-246a), and was signed at 2:00 A. M. on January 26 (R. 67a). Immediately following the signing of the statement, Marks was

told, for the first time, that he was under arrest, presumably as a deportable alien (R. 73a, 78a, 138a). Marks was thereupon removed to the maximum security section of the Federal Detention Headquarters; he was already in such detention when he was served, at 7:10 P. M. on January 26, with an administrative warrant of arrest (R. 66a-67a) issued by the Attorney General or his representative [see § 242(a)].

On January 26, 1961 charges were served on Marks by the Service for the institution of deportation proceedings under § 242. The charges stated that pursuant to § 349(a)(3) Marks was not a citizen or national of the United States because he was a "member of the armed forces of Cuba from January 2, 1959 to May 1960"; the charges concluded that Marks was an excludable and, therefore, deportable alien [see § 241(a)(1)] on the ground that he had been convicted on January 11, 1952 for the commission of a crime involving moral turpitude [see § 212(a)(9)], and on the further ground that, at the time he re-entered the United States from Cuba on July 22, 1960, he did not have the entry papers required of an alien [see § 212(a)(20)] (R. 17a-21a).

Hearings on the described charges were commenced before a Special Inquiry Officer of the Service on January 26, 1961, and several further hearings were held before him up to April 6, 1961. During those hearings, by letter dated March 16, 1961, counsel for Marks requested of the Attorney General of the United States that Marks be released on bail or parole pending the proceedings so that the relator could participate in the preparation and presentation of his defense (R. 21a-23a). This request was denied by the Attorney General by letter dated March 27, 1961 (R. 23a-24a).

On May 31, 1961, almost two months after the conclusion of the hearings before the Special Inquiry Officer, that Officer sustained the charge that Marks was a de-

portable alien (R. 7a). Marks, still in custody, thereupon appealed to the Board of Immigration Appeals, which, on August 2, 1961, dismissed the appeal and sustained the decision of the Special Inquiry Officer (R. 7a).

Before the decision of the Board of Immigration Appeals, Marks instituted a habeas corpus proceeding to obtain his release from the maximum security detention in which he was being held. The writ was denied by Judge Levet, who found that Marks was first obliged to exhaust his administrative remedies before a writ could issue, and bail was denied (198 F. Supp. 40).

The instant habeas corpus proceeding, brought pursuant to 28 U. S. C. A. 2241(c)(3), was commenced by order to show cause dated August 21, 1961 (R. 3a-4a). The petition alleged that Marks is not an alien or deportable and that his detention is illegal on constitutional, statutory and factual grounds (R. 5a-13a). By stipulation of counsel the proof on the issues raised in the habeas corpus proceeding was to consist of the testimony which was adduced at the hearing before the Special Inquiry Officer, subject, however, to all objections made at that hearing and to the rulings of the Court upon those objections (R. 30a-32a).

In the instant habeas corpus proceeding, the petitioner renewed his application for bail. Judge Cashin fixed bail at $10,000 (R. 33a-36a), and later reduced the bail to the sum of $5,000. On October 18, 1961 the petitioner was released under the prescribed bond. Until his release, Marks had been continuously detained for almost nine months in maximum security at the New York Federal Detention Headquarters since the inception of the administration proceeding on January 26, 1961, although he has been charged with no crime or criminal activity, and although, following the ruling of the Board of Immigration Appeals, a Justice Department "spokesman" publicly "ex-

pressed doubt * * * that Marks would be deported, because of the difficulty of finding a country that would accept him" (R. 24a-25a).

On March 29, 1962 Judge Cashin granted the writ, finding that the "proposed continued detention of the relator is * * * unlawful" for the reason that while the petitioner, according to the District Court, had lost his native-born American citizenship, no valid ground for deportation had been shown (203 F. Supp., at p. 317). The District Court considered that the petitioner was not excludable as an alien, and therefore not deportable, for failure to procure entry documents required of aliens at the time of his entry to the United States in July 1960, since there had been no competent judicial determination of petitioner's alienage prior to July 1960; similarly, the District Court held that petitioner's conviction in 1952, at a time when he was a citizen, did not render him excludable or deportable in his status as an alien.

Following this determination by the District Court, and to the present time, the petitioner's bail has been reduced to $1,000 and he has been released on such bail pursuant to stipulation and order as prescribed by Rule 49(3), Rules of the United States Supreme Court.

On April 9, 1963, the Second Circuit, in an opinion written by Judge Waterman, held that "[a]lthough we find great force in the constitutional arguments presented by relator's counsel, we are constrained by the superior authority of *Perez v. Brownell*, 365 U. S. 44 * * * (1948), to affirm the determination of alienage" (R. 381; 315 F. 2d, at p. 675). In addition, the Court of Appeals concluded that the denationalizing effect of petitioner's service in the Cuban rebel forces was immediately contemporaneous with such service so as to establish his alienage prior to his entry to the United States in July 1960, and his failure to obtain documents required of entering alien immigrants caused the

petitioner to be deportable as an excludable alien.[3] Accordingly, the Circuit Court reversed and dismissed the writ.

The petition to this Court for a writ of certiorari to review the issue specified at pages 2-4, *supra*, was thereafter granted by order dated October 14, 1963 (R. 385).

Summary of Argument

I.

§ 349(a)(3), as here applied, subjects the petitioner to arrest, detention, expatriation, statelessness, and deportation. These injuries, inflicted without judicial or any other kind of trial, inherently amount to punishment for constitutional purposes no matter whether they are the consequence of a regulatory or a penal statutory pattern. It is, moreover, clear from the effect, the operation, and the legislative history of § 349(a)(3), that in its application to persons of sole American citizenship such as the petitioner, § 349(a)(3) is a penal statute with the exclusive retributive purpose of stripping American citizenship from those whom the Congress considered to be lacking in allegiance to the United States. As a penal statute, § 349(a)(3) is unconstitutional because it permits the infliction of punishment in the absence of the procedural safeguards provided by the Fifth and Sixth Amendments and because the punishment of statelessness is so excessive as to violate the Eighth Amendment.

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[3] The Court of Appeals explicitly refrained from reaching or deciding the question whether Marks was also excludable and deportable on the grounds of his conviction for a crime involving moral turpitude. Because of petitioner's release on bail, the Court of Appeals also explicitly reserved decision on the question whether petitioner's detention, based solely on his prospective deportation [§ 242(a)], was unlawful in that no country would accept him as a deportee and he was in fact not deportable.

II.

The petitioner never in fact renounced or intended to renounce his American citizenship or allegiance, and it would be violative of due process irrebuttably to presume any such renunciation on the basis of his service in the Cuban Rebel Army at a time when that service was clearly compatible with loyalty and allegiance to the United States. Since the purpose and effect of § 349(a)(3), so far as it applies to persons of sole American citizenship, is to expatriate those lacking in allegiance to the United States, § 349(a)(3) does not here warrant the petitioner's denationalization. Any other construction of § 349(a)(3) is unauthorized. For the Constitution, which is the source of native-born American citizenship, provides no power to take away such citizenship which has not been renounced.

III.

The petitioner's administrative arrest and detention for a period of almost nine months were violative of the requirement of the Fourth Amendment that arrest and detention by an office of government shall be pursuant to a judicial warrant of arrest based upon probable cause supported by oath or affirmation. The administrative arrest and detention of Marks were effected as an incident of the power to exclude and deport aliens; absent alienage, the arrest and detention were wholly unlawful; but since the jurisdictional issue of the alienage of the native-born petitioner "r[equire]d judicial as against administrative adjudication" (*United States* v. *Minker*, 350 U. S. 179, 188), the arrest and detention of Marks without a judicial determination that he was an alien were an improper usurpation of the judicial function by the immigration officials.

IV.

The record establishes that Marks did not voluntarily serve in the armed forces of a foreign state so as to bring him within the operation of § 349(a)(3). Following January 2, 1959, the petitioner was, in effect, conscripted into the service of the Cuban Rebel Army, and his service in the Rebel Army until his escape from Cuba in May, 1960 was substantially attributable to the severe penalties imposed by the Cuban authorities for desertion and counter-revolutionary activities. Moreover, following January 2, 1959, the Cuban Rebel Army, though maintaining military forms, procedures, and discipline, was not an armed force as that term is used in § 349(a)(3) since that organization was officially and actually stripped of the military functions performed during the revolution and assigned to police, security and reconstruction "civic" duties.

V.

Even if Marks is an alien, he is not deportable. The power to deport is an incident of the power to exclude, and there is no constitutional power to exclude or deport a native-born who is in this country by dint of birth, not entry. The statutory grounds assigned for deporting Marks are, in any event, inapplicable: at the time he returned to this country in July 1960 there had been no competent determination of his alienage and so he cannot be deported for failure to procure entry documents required of an alien; and his conviction in 1952 of a crime involving moral turpitude is likewise no basis for deportation since he was, at the time of that conviction, a citizen, not an alien, and the applicable statute speaks of the excludability of an alien convicted of such a crime.

ARGUMENT

I.

§ 349 (a) (3), as here applied, imposes cruel and inhuman punishment without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments and is therefore in violation of the Fifth, Sixth, and Eighth Amendments.

Expatriating legislation resulting in statelessness has never been sustained by this Court. In *Trop* v. *Dulles*, 356 U. S. 86, expatriation pursuant to § 349(a)(8) for desertion in time of war was held the imposition of an unconstitutional penalty, four members of the majority of the Court holding that the resultant statelessness amounted to cruel and inhuman punishment. And in *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, where expatriation pursuant to § 349(a)(10) for draft evasion caused a condition of statelessness, the statute was held unconstitutional as the imposition of punishment without compliance with the procedural requirements set by the Fifth and Sixth Amendments for the conduct of criminal prosecutions. Accordingly, if § 349(a)(3), as here applied, is penal in nature and leaves the objects of its application stateless, it is unconstitutional, whether for the cruelty and inhumaneness of the "drastic, the truly terrifying" penalty of statelessness (Brennan, J., concurring in *Mendoza-Martinez*, *supra*, at p. 187) or because of the absence of a "prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses" (*Mendoza-Martinez*, *supra*, at p. 167). It is, therefore, decisive that, as we shall show, § 349(a)(3) is penal in form, purpose and application.

§ 349(a)(3) does not merely expatriate, it also creates statelessness. Prior to 1940 service in the armed forces of a foreign state was not by itself expatriating; from 1940 to

1952 such service in a foreign state caused loss of American citizenship if the soldier was a national of that state, thereby presumably leaving him with his other nationality intact; only since the enactment of § 349(a)(3) in its present form in 1952 can a person of sole American citizenship be caused to lose that sole citizenship by foreign military service (see pp. 20-22, 29-30, *infra*). § 349(a)(3) therefore results in statelessness in its application, and such is its uncontradicted effect upon the petitioner (R. 5a), the District Court correctly observed that as a result of the impact of § 349(a)(3) upon the petitioner, "he is a stateless alien" (203 F. Supp. at p. 397).

In addition to imposing a condition of statelessness, § 349(a)(3), in its application to petitioner, has other consequences associated with penal legislation. § 349(a)(3), in conjunction with the laws governing exclusion and deportation of excludable aliens [§§ 212, 241 and 242], provides the alleged authorization for the administrative arrest and approximately nine months detention of the petitioner described at pages 8-11, *supra*. The validity of this procedure is challenged at a later point in this brief. But the process of arrest and imprisonment in the enforcement of the denationalizing effect of § 349(a)(3) is here material to the understanding of that statute's operative aspects as a penal statute.

The administrative arrest and imprisonment of Marks were for the duration of the administrative proceeding on the issue of his deportability,—a detention period which included almost two months after the conclusion of hearings for the Service hearing officer to render a decision and another four months for determination by the Board of Immigration Appeals. The petitioner's request to the United States Attorney General for release was denied (R. 21a-23a), and release by habeas corpus was likewise denied pending exhaustion of administrative remedies (198 F. Supp. 40). And, as matters now stand, if the ruling

below is sustained, "the Attorney General shall have a period of six months" from the final order of this Court "within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained", and "[i]f deportation has not been practicable, advisable, or possible * * * within such six-month period the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section" [§ 242(c)].

§ 349(a)(3), as here applied, therefore exposes the petitioner to an unlimited period of "detention pending eventual deportation", particularly as it has been alleged and not denied that Marks cannot be deported to Cuba and no other nation will accept him as a deportee (R. 10a-11a); the proof discloses that a Justice Department representative publicly "expressed doubt * * * that Marks would be deported" (R. 25a). If it should prove that some nation will accept the petitioner as a deportee, and he is deported as an excludable and, therefore, deportable alien, Marks will have been banished into exile from this country forever.

Expatriation, statelessness, arrest, almost unlimited "further supervision and detention", and banishment are the substance of penal legislation. *Cummings* v. *Missouri*, 71 U. S. (4 Wall.) 277, 321, 324; *Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 168, n. 23. The imposition of such injury by a deliberate act of government is the imposition of punishment for constitutional purposes no matter whether the injury is inflicted for the conventional criminal law objectives of deterrence or retribution, or incidental to some other regulatory purpose. For some injuries when ordered by government must be deemed penalties,—and therefore subject to the safeguards constitutionally provided for criminal prosecutions,—just because of the nature of those injuries. Death, dismemberment, physical beating,

even hard labor (*Wong Wing* v. *United States*, 163 U. S. 228) are necessarily punishment for constitutional purposes, and they are no less so if suffered as an incident of regulation rather than pursuant to orthodox criminal legislation. Where an injury to judicially cognizable rights is sustained as an incident to, rather than as the objective of an official declaration of status, those rights remain nonetheless judicially cognizable and protected. *J.A.F.R.C.* v. *McGrath*, 341 U. S. 123.

Stateless and exile, the consequences here of § 349(a)(3), are injuries of the order of magnitude which, when imposed by government, constitute punishment. Nationality, is society's principal gravitational force; without it the individual is in the limbo of perpetual and omniprevalent alienage—he is an alien, literally a stranger, everywhere in the world. To be stateless is to be without the protection of any state anywhere. Previously, we associated statelessness with the tragic dilemma of those former German citizens rendered aliens in their own country by Hitler's racial laws.

In *Trop* v. *Dulles*, 356 U. S. 86, the plurality opinion of Chief Justice Warren made the point that

> "the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights." (356 U. S., at pp. 101-2)

These remarks are closely modeled after the earlier observation that

> "* * * [N]o description of expatriation as the loss of particular rights is adequate. For expatriation represents a loss of the right to have rights—loss of membership in an organized community capable of guaranteeing any rights at all. The individual becomes a stateless person, with no right to stay anywhere on the face of the earth. Every 'sovereign' State has the right to expel aliens from its borders, and modern States including the United States do so freely. Neither has he a right to leave any country; no State is obliged to issue a passport to him, and no State is obliged to admit him without one. Moreover, if a stateless person is a victim of a 'denial of justice' by the governmental authorities of a State, he has no recourse whatever. Under contemporary international law neither the governments of individual States nor international organizations are considered to have legal standing to intervene in his behalf. In summary, the stateless person has no rights, either intranational or international which are inalienable. He exists at the mercy of the State in which he resides." (64 Yale Law J., at pp. 1190-1191.)
>
> "* * * Since the 1920's, when a statelessness was first recognized as a world problem, every international conference on nationality has explicitly condemned legislation which results in the creation of stateless persons. The recognized treaties are unanimous in their disapproval of statutes which denationalize individuals without regard to whether they possess two nationalities. And the Universal Declaration of Human Rights strongly reaffirms the right of every individual to retain a nationality." (*Id.*, at 1195)

Even if the quality of statelessness as a punishment depends upon its context rather than its inherent nature, § 349(a)(3) as here applied is penal. For the penal consequences flowing from the application of § 349(a)(3) are no incidental by-product of a non-penal regulatory purpose

or pattern. The underlying and exclusive purpose served or intended by § 349(a)(3) in the case of persons of sole American citizenship is to exact loss of that American citizenship as a mode of retribution. Americans who serve in a foreign military force,—except where authorized to do so by the Secretaries of State and Defense—are deemed by the Congress to have demonstrated a lack of allegiance to the United States and unworthy of retaining American citizenship. And it is settled that the imposition of a disability or the deprivation of a civil or political right in retribution for such assumed disloyalty is punishment which may be decreed only pursuant to judicial processes, not declared by legislative enactment. *United States* v. *Lovett*, 328 U. S. 303; *Cummings* v. *Missouri*, *supra*; *Ex Parte Garland*, 71 U. S. (4 Wall.) 333.

Prior to 1940 service in the armed forces of a foreign state was not, *per se*, cause for loss of citizenship (see pp. 29-30, *infra*). In 1933 President Roosevelt, at congressional request (86 Cong. Rec. 11943), established a cabinet committee composed of the Attorney General and the Secretaries of State and Labor to revise and codify the nationality law. The cabinet committee report, following 5 years of study, proposed, *inter alia*, various new grounds for denationalization. These new provisions were stated to be

> "• • • merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States." (H. R. Comm. Print. Pt. 1, 76th Cong., 1st Sess., p. VII.)

The nationality code proffered by the cabinet committee included loss of citizenship for entering or serving in the armed forces of a foreign state (*id.*, at pp. 66-67). It was contemplated that one who

> "• • • voluntarily enters, or continues to serve in, the army of a foreign state, thus offering his all

> in support of such a state, should be deemed to have transferred his allegiance to it." (*id.*, at p. 67.)

In 1940 congressional hearings were conducted on the report and proposed code. Mr. Flournoy, Assistant Legal Adviser of the State Department, testifying in support of the above proposal, said that

> "* * * it does not seem reasonable that a person should give himself up and risk his life for the good of a foreign state and remain a citizen of the United States, although it may be reasonable to provide for recovering citizenship readily in such cases." (Hearings on H. R. 6127, 76th Cong., 1st Sess., p. 131.)

H. R. 9980, 76th Cong., 1st Sess., incorporated the proposed nationality code, with changes not here material. The bill was briefly debated and passed in the House in September, 1940. (86 Cong. Rec. 11965.) The Senate Committee on Immigration, however, rejected the House's formulation of denationalization for service in the armed forces of a foreign state, and confined such denationalization to the dual-national who serves in the army of a country of which he is a citizen. (Sen. Report No. 2150, 76th Cong., 1st Sess., p. 3.) The Senate revision had the effect of shifting the congressional purpose from coping with the problem of loss of allegiance to the problem created by the "conflict between the two nations over the military service of the dual national." (Pp. 38-39, United States Brief in *Perez* v. *Brownell*, 356 U. S. 44.) Ultimately, the bill passed as amended by the Senate (86 Cong. Rec. 12817-8, 13250) and became the Nationality Act of 1940 (54 Stat. 1137), the military service denationalization provision being § 401(c) thereof (54 Stat. 1168-9).

In 1950 the Senate Judiciary Committee, of which Sen. McCarran was chairman, proposed that denationalization for service in a foreign army not be conditioned upon dual-nationality or any other factor. (Sen. Report No. 1515, 81st

Cong., 2nd Sess., p. 749.) It was pointed out that under the Nationality Act of 1940 denationalization for foreign military service occurred only when the soldier was a citizen of that foreign country or where that foreign country required an oath of allegiance as a condition to military service. This was considered to be an undesirable lack of uniformity.

> "The subcommittee feels that the provisions covering the loss of nationality through service in the armed forces of a foreign country should be uniform and should not be dependent upon foreign law, and therefore is recommending changes in this subsection designed to effect such uniformity." (*id.*, at p. 749.)

By 1952 the same Senate committee under the same chairman proposed the bill which eventuated in the present § 349(a)(3) as part of the Immigration and Nationality Act of 1952. (Sen. Report No. 1137, 82nd Cong., 2nd Sess., p. 46.) There were no helpful congressional discussions or debate as to the effect of statelessness resulting from the extension of foreign military service denationalization from dual-nationals to persons of sole American citizenship. (See, *e.g.*, 2 U. S. Code Cong. & Admin. News (1952), p. 1742.) In 1952, then, Congress finally enacted in § 349(a)(3) the provision recommended 14 years earlier by the cabinet committee. In doing so, Congress equated those who did not with those who did take an oath of allegiance upon entering a foreign army. (Sen. Report No. 1515, 81st Cong., 2nd Sess., p. 749.) Congress thereby adopted the reasons which motivated the earlier recommendation, *i.e.*, retributive denationalization of those who repudiate American allegiance. (See Note, 54 Columbia Law Rev. 932, 942.)

Retribution is, of course, the typical characteristic of penal legislation, and § 349(a)(3), in its application to persons of sole American nationality, is retributive solely in

purpose and effect. For while the Congress was anxious to free the United States from the problems arising where an American national of dual-nationality asks for United States intervention to avoid foreign military service in the other country of which he is a national and a resident (see Tsiang, Expatriation in America Prior to 1907, p. 99), Congress, in enacting § 349(a)(3), was not and could not have been concerned with such problems in cases involving single rather than dual nationality.[4] The American with sole American citizenship in a foreign army has either been impressed into such service against his will or has joined of his own will; in the former case Congress did not intend to foreclose American intervention and in the latter Congress did not expect American intervention for the avoidance of service to be invoked. As appears from the review of the legislative history of § 349(a)(3), individual allegiance and not the conduct of foreign affairs is what preoccupied the Congress in formulating § 349(a)(3) so far as it applied to those of sole American citizenship.

The District Court, relying heavily upon *Perez*, found the legislative purpose in § 349(a)(3) to be the avoidance of international political embarrassment said to be potentially occasioned the United States by individual Americans serving in foreign armies. *Perez* does not, however, bear directly upon the question here discussed, *i.e.*, whether

[4] The object of the original statute, § 401(c) of the Act of 1940, in denationalizing only one who was a national of the foreign state in whose army he was serving, was, as indicated, to avoid conflicting claims of sovereignty over an American national who had been conscripted, over his objections, into the army of his alternate nationality and had invoked the protection of the American authorities. Curiously enough, in such a case the service would be considered involuntary and therefore not denationalizing under *Nishikawa* v. *Dulles*, 356 U. S. 129, so that in the one instance involving problems in the conduct of our foreign affairs which the Congress had in mind in enacting legislation to denationalize for service in a foreign army, denationalization is now not effected.

§ 349(a)(3) is penal since it results in statelessness. *Perez* did not involve statelessness, and the question of whether the statute there construed imposed punishment was never raised or discussed by the Court (see p. 33 n. 6, *infra*). How the instant case therefore differs from *Perez* is demonstrated by *Wong Wing* v. *United States*, 163 U. S. 228, where it was held that the exclusion, arrest, detention, and deportation of aliens could constitutionally be carried out by administrative officers, but the requirement that aliens perform hard labor while so detained was the imposition of an "infamous punishment" which could be inflicted only pursuant to a finding of guilt after judicial criminal proceedings. Statelessness is no less an "infamous punishment" than hard labor, and the presence of that factor here and not in *Perez* distinguishes this case from *Perez* in any discussion of the penal nature of § 349(a)(3).

Moreover, there is no foundation here for the supposition that § 349(2)(3) serves or was intended to serve to relieve the nation from "embarrassment" in the conduct of its foreign affairs. For § 349(a)(3) is not confined to "embarrassing" service in the military of an enemy or unfriendly nation, but would, as here applied, automatically denationalize even for "non-embarrassing" service in the army of an ally if such service has not been explicitly authorized by the Secretary of State and the Secretary of Defense. The legislative history of § 349(a)(3) confirms the absence of any purpose to avoid "embarrassment" since it does not contain the slightest suggestion of congressional concern that the act of an American individual would, to our embarrassment, be attributed to the entire nation or construed as national policy. If the problem had occurred to the Congress, no doubt techniques much simpler, more effective, and less destructive of individual rights than the imposition of statelessness could have been suggested to demonstrate the independence of the nation from the acts of a private individual (see *Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 185).

And, if cognizant of the problem, the Congress nevertheless insisted upon utilizing the device of statelessness and potential banishment, the penal purpose of the Congress would be established since such a device would be "excessive in relation to the [allegedly non-penal] * * * purpose assigned" (*Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 169; see also *United States* v. *Constantine*, 296 U. S. 287; *Helwig* v. *United States*, 188 U. S. 605), and invalid, in any event, for failure to adopt an alternative to imposing a condition of statelessness (*Schneider* v. *State*, 308 U. S. 147, 162; *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349).

It is, in the end, unthinkable that the Congress intended, or is empowered, to "disown" an American citizen in order to evidence American disclaimer of responsibility for his politically distasteful action. With the possible exception of *Perez*, there is no precedent for such a mode of expressing American policy. If the technique may be fairly considered as the intention and within the constitutional powers of the Congress, we can see no discernible limit to its application. All manner of individual conduct "embarrassing" to this country in its international political relations, from racial discrimination against representatives of foreign countries to unfair competitive business practices abroad, would thereby be cause to denationalize native-born Americans. The unlimited scope of logical extensions of the doctrine of regulation by denationalization militates against imputing to the Congress any intent to initiate such a doctrine. Accordingly, speculation as to some remote, never expressed congressional purpose to dissociate national American policy from private individual action by expatriation and banishment cannot serve to avoid the conclusion that § 349(a)(3), as here applied, is "concerned solely with inflicting effective retribution upon" Americans serving in foreign armies (*Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 182); so understood § 349(a)(3), as here applied, is unconstitutional under the rulings of this Court in *Trop* and *Mendoza-Martinez*.

II

The petitioner never renounced or intended to renounce his American citizenship or allegiance. In such circumstances § 349 (a) (3) is inapplicable. Any other construction of § 349 (a) (3) would render it unconstitutional.

The record here is devoid of any evidence of renunciation of, or any intent to renounce, his American citizenship by Marks. The proof discloses only the intention to retain American allegiance and citizenship. Although Marks was eligible for Cuban citizenship because he had risked his life in the revolution (R. 263a-267a), Marks never applied for or received such citizenship (see R. 119a-120a, 140a). It is also uncontroverted that promptly upon receipt of State Department notice of loss of citizenship while still in Cuba, Marks first protested the action to the American Consulate (R. 127a-128a), and then publicly announced his desire to retain and fight for his citizenship (R. 282a, 284a).

There is no incompatibility between petitioner's activities in the Rebel Army and his allegiance to the United States. In his initial association with the Rebel Army, Marks was part of an effort to rid the Cuban people of an oppressive tyranny (R. 141a-145a); and in his association with the early post-revolutionary activities of the Rebel Army, Marks was part of an effort to effect the social and political reconstruction of Cuba (R. 121a-126a, 176a-178a); in both of these endeavors the petitioner was connected with a movement which had the sympathy and well-wishes of the United States as evidenced by the following extracts from the April 4, 1961 report of our State Department:

> "* * * The hemisphere rejoiced at the overthrow of the Batista tyranny, looked with sympathy on

the new regime, and welcomed its promises of political freedom and social justice for the Cuban people." (R. 284a-285a)

"The character of the Batista regime in Cuba made a violent popular reaction almost inevitable. The rapacity of the leadership, the corruption of the Government, the brutality of the police, the regime's indifference to the needs of the people for education, medical care, housing, for social justice and economic opportunity—all these, in Cuba as elsewhere, constituted an open invitation to revolution.

"When word arrived from the Sierra Maestra of the revolutionary movement headed by Dr. Fidel Castro Ruz, the people of the hemisphere watched its progress with feeling and with hope.

"The Cuban revolution could not, however, have succeeded on the basis of guerrilla action alone. It succeeded because of the rejection of the regime by thousands of civilians behind the lines—a rejection which undermined the morale of the superior military forces of Batista and caused them to collapse from within.

"This response of the Cuban people was not just to the cruelty and oppression of the Batista Government but to the clear and moving declarations repeatedly made by Dr. Castro concerning his plans and purposes for post-revolutionary Cuba." (R. 285a-286a)

"Dr. Castro, in short, promised a free and democratic Cuba dedicated to social and economic justice. It was to assure these goals that the rebel army maintained itself in the hills, that the Cuban people turned against Batista, and that all elements of the revolution in the end supported the 26th of July Movement.

"It was because of the belief in the honesty of Dr. Castro's purposes that the accession of his regime to power on January 1st, 1959, was followed within a single week by its acceptance in the hemisphere—

a recognition freely accorded by nearly all the American republics, including the United States.

"For a moment the Casto regime seemed determined to make good on at least its social promises. The positive programs initiated in the first months of the Castro regime—the schools built, the medical clinics established, the new housing, the early projects of land reform, the opening up of beaches and resorts to the people, the elimination of graft in government—were impressive in their conception; no future Cuban Government can expect to turn its back on such objectives." (R. 286a-287a)

"* * * The rebel army and the 26th of July Movement expressed the profound and passionate desire of the Cuban people for democracy and freedom, a desire sanctified in the comradeship and sacrifice of the revolutionary struggle. * * *" (R. 290a)

In a very similar vein were the remarks of the late President Kennedy in a recently reported interview:

"I approved the proclamation which Fidel Castro made in the Sierra Maestra, when he justifiably called for justice and especially yearned to rid Cuba of corruption * * *. In the matter of the Batista regime, I am in agreement with the first Cuban revolutionaries. That is perfectly clear." 149 The New Republic (Dec. 14, 1963), p. 16.

We do not, of course, mean to suggest that Fidel Castro's subsequently disclosed amenability to communist influence and, perhaps, domination is at one with the interests of the United States. But even this development emphasized Marks' continued adherence to his American allegiance. For it was his testimony, nowhere contradicted in the record, that he resisted and actively fought communists and communist doctrine wherever he encountered them in the Rebel Army, that his militantly expressed and implemented anti-communism resulted in his frequent transfers and his demotion, and that his anti-communist activities

finally caused him to come under the surveillance of the secret police (DIER) so that he was obliged to flee from Cuba to save his life (R. 123a-126a, 132a-134a).

In this same connection, the petitioner testified, and without any contradiction, that while serving at La Cabana (R. 123a) and then later while serving at Principle (R. 126a-127a), Marks accorded very considerable cooperation to members of the American consulate and the F.B.I.—cooperation which sometimes involved dangerous breaches of duty (R. 127a). The absence of any evidence to challenge the petitioner's testimony concerning his anti-communism and cooperation with the American authorities is persuasively corroborative of that testimony in view of the obvious availability of the named American authorities and the demonstrated availability to the Service at the hearings of many Cuban refugees with direct and personal knowledge of the history of the Rebel Army.

If the record here is compared with *Kawakita* v. *United States*, 343 U. S. 717, where the most abject and slavish loyalty to the Japanese cause was not deemed antithetical to American allegiance, it becomes clear that nothing the petitioner did while in Cuba can fairly be held to demonstrate renunciation of, or an intent to renounce, his American citizenship.

Of course the act of joining and serving in Cuba in the Rebel Army cannot, without more, be conclusively presumed an intent to renounce American citizenship or allegiance. Almost since the beginning of the nation it has been a crime to enlist in the United States for foreign military service (18 U. S. C. A. 959), but the prohibition has not extended to those, as the petitioner, who left the country to enlist abroad. *Wiborg* v. *United States*, 163 U. S. 632; *United States* v. *Hertz*, 26 Fed. Cas. No. 15357 (C. C. E. D. Pa.); *United States* v. *O'Brien*, 75 F. 900 (C. C. N. Y.). Our early doctrine, which generally foreclosed individual renunciation of American citizenship, also meant that for-

eign military service did not effect loss of such citizenship. *McIlvaine* v. *Coxe's Lessee*, 8 U. S. (4 Cranch) 209; see also Tsiang, *op. cit. supra*, at pages 38-41, 56-61, 66-67. But even after the Congress, in the Act of 1868, permitted voluntary renunciation of American citizenship, it was considered in the administration of the Act that "voluntary entrance by a person of sole American citizenship into foreign military or naval service was not considered as an evidence of expatriation". Tsiang, *op. cit. supra* at page 102.

A similar appraisal of the relationship between American allegiance and service in a foreign army was made by the President's Commission on Immigration and Naturalization when it pointed out:

> "Service in foreign armies by American citizens can be motivated by many purposes entirely consistent with allegiance to the United States. Thus, before entry of the United States into World War II, many Americans volunteered for service in the armies of Canada, Great Britain, and other nations later allied with the United States. Other young Americans serve in foreign armies because of a spirit of adventure; still others may serve as technicians." (President's Commission, Whom Shall We Welcome, p. 243.)

In such circumstances an irrebuttable presumption that service in a foreign army is renunciation of American citizenship is contrary to experience and, therefore, beyond the power of the Congress.

> "Of course a citizen has the right to abandon or renounce his citizenship and Congress can enact measures to regulate and affirm such abjuration. But whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case * * *. Although Congress may provide rules of evidence for such trials, it cannot declare that such equivocal acts as service in a

> foreign army, participation in a foreign election or desertion from our armed forces, establish a conclusive presumption of intention to throw off American nationality. Cf. *Tot* v. *United States*, 319 U. S. 463. Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship." [*Nishikawa* v. *Dulles*, 356 U. S. 129, 139 (Black, J., concurring); *cf. Kennedy* v. *Mendoza-Martinez*, *supra*, at pp. 215 n. (dissent, Stewart and White, JJ., presumption of intent to evade draft based upon fact of departure unconstitutional)]

See also:

Bailey v. *Alabama*, 219 U. S. 219;
Lindsley v. *Natural Carbonic Gas Company*, 220 U. S. 61;
McFarland v. *American Sugar Ref. Co.*, 214 U. S. 79;
Manley v. *Georgia*, 279 U. S. 1;
Western & Atlantic R. R. v. *Henderson*, 279 U. S. 639;
Heiner v. *Donnan*, 285 U. S. 312;
Morrison v. *California*, 291 U. S. 82.

It is, therefore, clear that the petitioner has neither actually nor presumptively renounced his American citizenship or allegiance. The issue which remains is whether such renunciation is a prerequisite to the applicability of § 349(a)(3). That question was not reached in *Nishikawa* v. *Dulles*, 356 U. S. 129, the single case involving denationalization for foreign military service decided by this Court.[5] We believe that the Constitution, because it "is silent about the permissibility of involuntary forfeiture of

[5] One District Court held the predecessor to § 349(a)(3) unconstitutional because it included non-renunciatory action. *Kiyokuro Okimura* v. *Acheson*, 99 F. Supp. 587 (D. Haw.), *remanded* 342 U. S. 899, *aff'd*, 111 F. Supp. 303.

citizenship rights" (*Kennedy* v. *Mendoza-Martinez*, *supra*, at p. 159), forbids such forfeiture and that this Court must interpolate the requirement of renunciation, as a condition to a finding of expatriation causing statelessness, if § 349 (a)(3) is to be sustained.

The unqualified right to American citizenship of the native-born is guaranteed by the 14th Amendment (§ 1, cl. 1). On the other hand, there is to be found in the Constitution no express power or authority to denationalize a native-born.

> "The Fourteenth Amendment, while it leaves the power, where it was before, in Congress, to regulate naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right to citizenship." *United States* v. *Wong Kim Ark*, 169 U. S. 649, 703.

Of course, what the Congress may not take away, the citizen may voluntarily renounce. "[A] change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizenship" (*Mackenzie* v. *Hare*, 239 U. S. 299, 311); "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance" (*Perkins* v. *Elg*, 307 U. S. 325, 334; see also, *Matter of A*, 2 I & N Dec. 304, 307). Accordingly, the usual and most unexceptionable mode of expatriation of an American-born citizen is by a voluntary renunciation of that citizenship.

It has also been held that native-born American citizenship can be lost by a dual-national who has by word or action explicitly or implicitly opted for his alternate nationality. *Mackenzie* v. *Hare*, 239 U. S. 299; *Savorgnan* v. *United States*, 338 U. S. 491; *Perez* v. *Brownell*, 356 U. S. 44. But no case has held that sole American citizenship can be lost, and a status of deportable statelessness imposed, except by explicit renunciation or by action which can conclusively

be deemed renunciatory of American allegiance.[6] Acts which may be deemed sufficiently demonstrative of an election of allegiance by a dual-national do not necessarily establish voluntary renunciation of sole American allegiance resulting in statelessness. In any event, the cases cited did not, as does this proceeding, involve legislation devoted solely to the congressional purpose of taking American citizenship from those believed by the Congress to hold no, or a diluted allegiance to this country (see pp. 19-25, *supra*). And so the inquiry into actual and intended renunciation of allegiance was not as decisively material in those cases as it is here.

The interpretative experience of the post-1940 legislation dealing with denationalization for foreign military service tends to confirm the materiality of the factual inquiry whether such service is instanced by an adherence to or a renunciation of American allegiance.

In the Matter of S, 1 I & N Dec. 476, concerned a dual-national, a citizen of Canada and of the United States, who registered for the Canadian draft and sought to enlist in the Canadian Army. The Service held that loss of American citizenship did not necessarily follow. In the cited case, Prof. Freund of the Harvard Law School noted "that the fact that the applicant registered for the draft in Canada is not a voluntary abandonment of American citizenship" (p. 483), and the then Attorney General Clark agreed, saying:

> "Under the circumstances of the war it may well be that his registration and effort to enlist are

[6] *Perez* v. *Brownell*, *supra*, sustained denationalization under the predecessor to § 349(a)(5) for voting in a foreign election without regard to the existence of any renunciatory intent. But *Perez* was a dual-national who had manifested his intention to retain his non-American citizenship (see Note, 31 Fordham L. Rev. 373, 377-388), so that the case did not involve statelessness and the opinions in *Perez* do not discuss the constitutional consequences of that status. Moreover, *Perez* was an action for a declaratory judgment to determine status as a citizen and, therefore, did not reach the issue of deportability. 356 U. S. at page 65.

> to be attributed to a motive to join a war consistent with the interests of the United States." (p. 484)

In *Shibata* v. *Acheson*, 86 F. Supp. 1 (S. D. Cal), where it appeared that an American conscripted into the Japanese Army maintained his intention to remain an American citizen and to return to the United States, service in the foreign army did not result in denationalization. Again, in *Scardino* v. *Acheson*, 113 F. Supp. 754 (D. N. J.), an American conscripted into the Italian Army during the war, who took the required Italian oath of allegiance, was not denationalized when it was found that he had been unwilling to fight American soldiers. See also, *Dos Reis ex rel Camara* v. *Nicolls*, 161 F. 2d 860 (C. A. 1).

A perceptive analysis of the foreign military service cases up to 1952 concluded that:

> "If he [the soldier] manifested by overt acts prior, during or subsequent to induction, a continuing allegiance to the United States the military service is deemed involuntary." (Note, 54 Columbia Law Rev. 932, 941).

The same analysis found that the effect of the enactment of § 349(a)(8) in 1952 was to strengthen the foregoing conclusion:

> "In view of the change in the function of this provision [§ 349(a)(3)], the courts are likely to expatriate for service in a foreign army only where the motives for enlisting were inconsistent with allegiance to the United States." (*id.*, at p. 942.)
>
> "• • • the courts have implicitly drawn a distinction between dual nationality and dual allegiance. In the latter area, expatriation has been refused if the actor's motives were not indicative of foreign attachment." (*id.*, at p. 943.)

Judicial power to construe § 349(a)(3) so as to interpolate an intention to renounce American allegiance in cases involving persons threatened with statelessness by

denationalization cannot be disputed. Interpolation of a specific and actual intent in order to save a federal statute from unconstitutionality is an established practice. See *e.g., Screws* v. *United States*, 325 U. S. 91. Similarly, where federal legislation impinges upon cherished and fundamental constitutional rights, the legislation will, wherever possible, be read to be limited to the precise action or intention which may be constitutionally regulated, although language to such effect is absent from the statute. See, *e.g., Dennis* v. *United States*, 341 U. S. 494. Such a reading of § 349(a)(3) is particularly authorized in view of the doctrine that in cases which involve "the purpose of depriving one of the precious right of citizenship the facts and the law should be construed as far as is reasonably possible in favor of the citizen." (*Schneiderman* v. *United States*, 320 U. S. 118, 122; quoted with approval in *Nishikawa* v. *Dulles*, 356 U. S. 129, 134-135.) Thus it has been consistently acknowledged that, for constitutional reasons, § 349(a)(3) must be read to require clear, convincing and unequivocal proof that the expatriating act was voluntary (see *Nishikawa* v. *Dulles, supra; Matter of A*, 2 I & N Dec. 304), although the law contains no language expressly imposing such an evidentiary requirement.

The denaturalization and denationalization cases in this Court amply evidence the judicial practice of interpolating standards and quanta of proof calculated to reconcile the crushing judgment of loss of American citizenship with constitutionally permissible legislative powers and objectives. (See, *e.g., Baumgartner* v. *United States*, 322 U. S. 665; *Bridges* v. *Wixon*, 326 U. S. 135; *Knauer* v. *United States*, 328 U. S. 654; *Schneiderman* v. *United States, supra; Nishikawa* v. *Dulles, supra.*) The general "presupposition of our law to resolve doubts • • • against the imposition of a harsher punishment • • •" (*Bell* v. *United States*, 349 U. S. 81, 83) has special applicability in exclusion and deportation cases where the Court has refused to "assume that Congress meant to trench on [an

alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10; see also *Barber* v. *Gonzales*, 347 U. S. 637, 642-643; *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391.

United States v. *Minker*, 350 U. S. 179, affords an illuminating illustration of the latitude of construction available in this case. § 235(a) of the Immigration and Nationality Act of 1952 [8 U. S. C. A. 1225(a)] permits immigration officers to subpoena and question "witnesses" on any matter relevant to the enforcement of the Act. The Service invoked § 235(a) as authority to question a naturalized citizen to determine if cause existed for his denaturalization. It was held that, although it could not be denied that the word "witnesses" could "readily be deemed to cover" the citizen under investigation (350 U. S., at p. 186), § 235(a) would not be so read on the grounds that "Congress has not provided with sufficient clarity that the subpoena power granted by § 235(a) extends over persons who are the subject of denaturalization investigations * * *" (*id.*, at p. 190). This manner of statutory construction was explicitly based upon the special considerations which underlie cases involving loss of citizenship (*id.*, at pp. 187-8).

No previous cases more impellingly evoked the exercise of the foregoing principles and practice. Never previously has this Court been confronted with the prospect of adjudging a native-born American stateless and deportable. Unless expressly required, no statute should be construed to impose such a condition contrary to the intent of the subject of that status.

The proposal to denationalize and deport the petitioner, notwithstanding the total absence of any proof of an intention of expatriation, may occasion no shock to some who conclude that the unprecedentedly harsh treatment of Marks, including the devastating judgment of statelessness, warrants no sympathy in view of his role in post-revolu-

tionary Cuba. But rendering the petitioner stateless for action not amounting to voluntary and intentional expatriation threatens us all. If Marks' citizenship may be taken away from him because of politically offensive behavior which is not incompatible with allegiance to the United States and American citizenship, then none of us is safe from the risk of banishment. It is for this reason that we have urged the construction of § 349(a)(3) to be found under this point.

Neither Lafayette nor Kosciusko repudiated his native nationality by assisting the American Revolution. Americans risked their lives throughout the 19th Century in support of the cause of national independence in Europe. Even before our entrance into World War I, Americans, conscious of and loyal to their American allegiance, fought on the side of our future allies. Again, during the Spanish Civil War, many Americans chose to demonstrate their faith and belief in the principles of democracy by fighting actively with the established Spanish Republic against the insurgency of Franco. And during World War II, thousands of Americans decided, before our government was ready to do so, that they would commit their safety and even their lives to resist German aggression.

The current of present events and the prospect of future ones do not lessen the impulse of Americans to support their political convictions by taking part in foreign struggles where freedom is in issue. Deference to this impulse will come not only from organized official action such as the Peace Corps or our government assistance to other nations in the form of money, materials, and personnel, but also from individuals. It contravenes our traditions to strip Americans of citizenship for enlisting in the cause of Israel if that country should be invaded by the Arab powers, or for fighting to support any of the new African nations if threatened by a power intent upon restoring such nation to its previous colonial status.

The argument under this head involves transcending issues of political freedom and the integrity of American citizenship. A country capable of recognizing that Princess Grace Kelly did not forfeit her American citizenship by assuming the role of a reigning sovereign of a foreign country should be just as capable of recognizing that Herman Marks did not lose his American citizenship because he participated in the post-revolutionary police and reconstruction activities of the Cuban Rebel Army. The common principle in the two cases is that citizenship of a native-born American is not something which can be taken away, but is a status which can be lost only by a knowing and voluntary renunciation. This principle underlies the proper construction of § 349(a)(3) pursuant to the Constitution and the applicable authorities.

For the reasons indicated, the convincing proof that the petitioner intended not to renounce, but to retain his American citizenship and allegiance, and that his activities in Cuba and the Cuban Rebel Army were compatible with American allegiance, preclude a finding of expatriation, statelessness, and deportability.

III

The administrative arrest of petitioner, and his subsequent detention based upon his alleged deportability without any prior competent judicial adjudication of his alienage were improper and unconstitutional exercises of the judicial power by an administrative agency.

Marks' detention started on the evening of January 25, 1961. At 8:00 P. M. of that evening, two Service investigators came to Marks' apartment (R. 62a, 67a). From that time until his release on bail almost nine months later he was, at all times, in the custody of the Service. While there is conflict in the testimony on this score, it is fair to conclude that after the Service investigators started to

question Marks, and particularly after he was brought from his home to the Investigations Section of the Service's office sometime between 9:30 and 10:00 o'clock at night for interrogation which lasted almost five hours, Marks was not at liberty to leave the custody of the Service. (See R. 61a-81a, 134a-139a.) Marks was thus detained by the Service although, admittedly, no grounds for arrest existed at the time (R. 73a-74a).

At the end of the interrogation, a sworn statement in the handwriting of one of the investigators was signed by Marks. The statement referred to Marks' service in the Cuban Rebel Army from 1958 to May, 1960. It was conceded that much of the language in the statement was composed by the investigator (R. 80a-81a, 245a-246a) and, in at least one respect, based on nothing which Marks told the scribe of the statement (R. 239a-245a).

Promptly upon the execution of his statement, Marks was told he was under arrest and placed in jail. No writ of arrest had been issued at the time; an administrative writ of arrest was not served on Marks until 7:10 P. M. of January 26, 1961 (R. 66a-67a), almost 24 hours after the questioning began, more than 20 hours after he was brought to the headquarters of the Service, and 17 hours after he was admittedly taken into custody. Such an arrest would be unlawful if made in the course of criminal law enforcement and the statement taken would be inadmissible. *McNabb* v. *United States*, 318 U. S. 332; *Mallory* v. *United States*, 354 U. S. 449. Administrative arrest, not based upon a judicial writ, must surely be subject to no lesser strictures or standards.

Even if Marks' arrest had been attended by greater deference to the required proprieties, it was unlawful since not pursuant to judicial writ issued on probable cause supported by sworn proof, and not based upon the commission of any overt or probable criminal conduct. Service arrest warrants, once required to be based upon sworn

statements as to probable cause (see former 8 U. S. C. A. 282; Rule 22, Reg. of Secy. of Labor under Immigration Act of 1917), need no oath or affirmation concerning probable cause (see 8 CFR 242.1 ff.). But the Fourth Amendment contemplates a judicial warrant of arrest based upon "probable cause, supported by oath or affirmation," not an administrative writ of arrest where the arresting agency rather than an independent judicial officer or magistrate determines the right to arrest. The Fourth Amendment commits the authority to issue a warrant of seizure to "the informed and deliberate determinations of magistrates" and not "the officers or others who may happen to make arrests" (*United States* v. *Lefkowitz*, 285 U. S. 452, 464). Issuance of writs of arrest, under the Fourth Amendment, must be based upon findings to be made "* * * by a neutral and detached magistrate instead of being judged by the officer * * * " (*Johnson* v. *United States*, 333 U. S. 10, 14).

Abel v. *United States*, 362 U. S. 217, expressly reserved decision on the issue of the constitutionality of administrative arrests in deportation proceedings because not adequately raised below. No such waiver obtains here. For the petitioner has urged the issuance of the writ on the ground that his detention, without judicial warrant and without probable cause based upon criminal conduct, is unlawful because it violates the Fourth and Fifth Amendments.

The petitioner's lengthy administrative detention, following upon his administrative arrest, was likewise unlawful because in derogation of the judicial function. The respondent's power to detain is strictly as an incidence of his power to deport, and both depend upon the detainee's alienage. § 242, the statute which authorizes the detention of an alien preparatory to his deportation, vests the power of such detention in the Attorney General. But neither § 242 nor any other statute has authorized the Attorney General to settle issues of citizenship, deportability and detention in the case of American-born persons. For what-

ever the extent of the Attorney General's power to rule on the deportability of aliens, when native-born American citizenship is shown or plausibly claimed, the issue of the existence of American citizenship is exclusively a matter for the judiciary.

Mr. Justice Frankfurter observed that the decisions of the Supreme Court "* * * requir[e] judicial as against administrative adjudication of the issue of citizenship in a deportation proceeding * * *" (*United States* v. *Minker*, 350 U. S. 179, 188). The cases sustain this view. *Ng Fung Ho* v. *White*, 259 U. S. 276; *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149; *Kessler* v. *Strecker*, 307 U. S. 22. The exclusivity of the judicial power to determine the issue of plausibly claimed American citizenship is evidenced by the line of authorities since *Ng Fung Ho* v. *White*, *supra*, which declared the doctrine of exhaustion of administrative remedies inapplicable in such cases.

> "That relators had the right to have the question of their citizenship determined in advance of deportation proceedings, under the claim here made is settled by the authorities."
>
> *Ex parte Kazan*, 5 F. 2d 243, 244 (S. D. Texas, 1925) (Hutcheson, J.).

Accord:

> *United States ex rel. Gonzalez* v. *Kirk*, 39 F. 2d 246 (S. D. Texas, 1930);
>
> *Ex parte Gros*, 123 F. Supp. 718 (N. D. Cal., 1954).

See also:

> *Wong Wing Foo* v. *McGrath*, 196 F. 2d 120, 122 (C. A. 9, 1952);
>
> *United States ex rel. Chin Ming Mow* v. *Shaughnessy*, 118 F. Supp. 490, 493 (S. D. N. Y., 1953) (Conger, J.).

The foregoing considerations have led Mr. Justice Black to note in a concurring opinion that the issue "whether citizenship has been voluntarily relinquished is a question to be determined on the facts of each case after a judicial trial in full conformity with the Bill of Rights" (*Nishikawa* v. *Dulles*, 356 U. S. 129, 139).

If, as seems clear, the petitioner was entitled to a judicial hearing on the issue of his citizenship, it is no answer here that he has ultimately received such a hearing. Entitlement to a judicial hearing may, in cases involving property rights, be properly deferred until the completion of some other prior form of proceeding. *Phillips* v. *Commissioner*, 283 U. S. 589, 595-597. One commentator has observed, however:

> "Is it sufficient if relief is forthcoming via this circuitous route? . . . cases where personal liberty is involved, the answer would seem plainly to be *no*." [Cooper, Administrative Agencies and the Courts, p. 85 (emphasis in original)].

And where, as here, the judicial hearing is preceded by the imposition of the very injury to be reviewed, *i.e.*, detention pending deportation, the deferment of the constitutionally guaranteed judicial hearing to the conclusion of the prior executive proceeding is in derogation of that guarantee. Cf. *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 423-425; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (App. D. C.), *cert. den.*, 347 U. S. 990; Admin. Pro. Act § 10 (d), 5 U.S.C.A. 1009(d). The established right to a judicial determination of citizenship in habeas corpus for the purpose of settling the citizen's right not to be deported or detained pending deportation is obviously not satisfied by a procedure where a summary administrative arrest and nine months' detention pursuant to administrative determination precedes the constitutionally required hearing.

Marks was entitled to have the issue of his citizenship determined judicially. § 349(a)(3), as here applied over his timely objection, denied him that right until after his arrest and lengthy detention. Marks was thereby *pro tanto* denied the right to a judicial determination of whether he was an alien subject to such administrative arrest and detention.

IV

The finding of alienage here is contrary to the applicable decisions of this Court.

The argument under this heading reviews the evidence and the law to determine whether Marks has been denationalized under § 349(a)(3). Three preliminary observations are in order:

(1) The prior administrative decisions on the issues under review are entitled to no weight. *Perez* v. *Brownell*, 356 U. S. 44, 47; *Kessler* v. *Strecker*, 307 U. S. 22, 34-35; *United States ex rel. Medeiros* v. *Watkins*, 166 F. 2d 897 (C. A. 2); *Frank* v. *Rogers*, 253 F. 2d 889, 892 (App. D. C.); *Chin Hoy* v. *United States*, 293 F. 750 (C. A. 6).

(2) Marks' *prima facie* case on the issue of his citizenship arises by dint of his conceded American birth (*Nishikawa* v. *Dulles*, *supra*, at p. 133; *Perez* v. *Brownell*, *supra*, at p. 47), and thereupon "The Government must prove the act of expatriation on which the denial [of citizenship] was based by '"clear, unequivocal, and convincing" evidence which does not leave "the issue in doubt".' *Gonzales* v. *Landon*, 350 U. S. 920; see *Schneiderman* v. *United States*." *Perez* v. *Brownell*, *supra*, at p. 47. This evidentiary standard is applicable to cases involving denationalization for foreign military service. *Nishikawa* v. *Dulles*, *supra*.

(3) This Court must re-examine for itself, and independent of the limited scope of review provided by Rule

52(a), Fed. R. Civ. Pro., whether the Government has carried the prescribed burden of proof. *Baumgartner* v. *United States*, 322 U. S. 665, 670-671; *Chaunt* v. *United States*, 364 U. S. 350, 353.

A.

The finding that the petitioner's service in the Cuban Rebel Army after January 2, 1959 was voluntary is in conflict with *Nishikawa* v. *Dulles*, 356 U. S. 129

Marks entered the Cuban Rebel Army in 1958 during the Cuban revolution and some time prior to January 2, 1959. But since the Rebel Army could not, prior to the overthrow of the Batista government, be deemed "the armed forces of a *foreign state*", Marks' activities in the Rebel Army prior to January 2, 1959 are not cited as part of the amended charges. Consequently, the issues here necessarily relate to the nature and effect of Marks' activities in the Rebel Army after January 2, 1959, rather than his entry into the Rebel Army some time earlier.

Nishikawa v. *Dulles*, 356 U. S. 129, conditions denationalization for foreign military service upon the most convincing proof that such service was voluntary. Where entry into a foreign military force is the result of conscription, or where service therein is enforced by laws against desertion, then there has been a failure to establish the requisite voluntariness (*Matter of A*, 2 I & N Dec. 304; 40 Opin. Att'y Gen. 553; *Matter of R*, 3 I & N Dec. 470).

In *Matter of A*, *supra*, a native American, born of Mexican parents, voluntarily joined the Mexican Army prior to the time when entry for service in a foreign army was grounds for expatriation. He continued to serve until a time after the effective date of the legislation providing for denationalization where one serves in the army of a foreign state of which he is a national. The Board of Immigration Appeals, as approved by the Attorney General, held the service to be involuntary and no grounds for

expatriation, notwithstanding the original voluntary enlistment, in view of the Mexican laws against and punishment for desertion.

Similarly in 1947, the then Attorney General Clark advised Secretary of State Marshall that where an American citizen under the age of eighteen entered the armed forces of a foreign state of which the minor was also a national, and then continued in such foreign armed forces after the age of eighteen

> "My conclusion is that continued service after the age of 18, whether the service began prior thereto by voluntary enlistment or by involuntary induction, is not alone sufficient to cause loss of United States nationality" (40 Opin. Att'y Gen. 553).

Again, in *Matter of R, supra*, a German-American inducted into the German Army while under eighteen who served until after the age of nineteen, and took an oath of allegiance to Germany in 1944, was held not to have been expatriated. The original entry being unexceptionable due to his age, the respondent in that case was deemed not responsible for his continued service since it was not shown that he could have obtained a discharge when he passed the age of eighteen and that he knew he could obtain such a discharge but failed to do so.

From the foregoing it is settled that the voluntariness of Marks' service in the Rebel Army must be appraised as of January 2, 1959 and thereafter. His original enlistment and service prior to January 2, 1959 was not in the armed forces of a foreign state and are concededly no grounds for expatriation. The question which remains, therefore, is whether the respondent has proven convincingly that Marks' activity in the Rebel Army after January 2, 1959 was voluntary.

The term "voluntary" has a special and artful meaning in matters pertaining to loss of citizenship and requires some discussion before reviewing the proof on that score.

One competent analysis of the term "voluntary" in expatriation cases suggests that it means action which renounces American allegiance. Note "'Voluntary': A Concept in Expatriation Law", 54 Columbia Law Review 932. If so, then clearly Marks' actions were not voluntary (see pp. 26-29, *supra*). But even if "voluntary" means something other than renunciation of allegiance, it is here sufficient that, in expatriation cases, involuntary does not mean acts performed solely because of coercion or duress; action is involuntary if the threat of punishment or injury contributes substantially to the action.

Foreign military service, performed pursuant to conscription, is involuntary even if the individual performing such service might have done so in the absence of coercion or duress. [See, *e.g.*, *Matter of A.* 2 I & N Dec. 304; see also *Podea* v. *Acheson*, 179 F. 2d 306 (C. A. 2); *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2).] No expatriation case involving foreign military service has required a showing that the individual would not have served in the foreign army if not for conscription. The rule is, apparently, that so long as some form of compulsion exists, then foreign military service is involuntary unless it clearly and affirmatively appears that that service was wholly volitional and the compulsion played no part.

Moreover, the compulsion involved need not be solely the effect of a conscription law. *Stipa* v. *Dulles*, 233 F. 2d 551 (C. A. 3), recognized that economic compulsion of any substantial degree renders service in a foreign government involuntary for purposes of denationalization. In *Kenji Kamade* v. *Dulles*, 145 F. Supp. 457 (D. Cal.) (Weinfeld, J.), it was held that a Japanese-American who took a position as a school teacher in Japan was not expatriated thereby under § 349(a)(4) (which expatriates for working for a foreign government). The teacher's need to earn a livelihood was held to render such employment involuntary. Again, in *Insogna* v. *Dulles*, 116 F. Supp. 473 (D. D. C.),

it was held that an American citizen of Italian birth who took a job with the Mayor of an Italian city was not expatriated. A job taken for purposes of subsistence did not constitute voluntary employment. In none of the cited cases does it clearly appear that the citizen could find no other means of sustenance.

The question whether petitioner's alleged military service was voluntary, as that term has been construed in the denationalization cases, ultimately involves an assessment of three principal events in the period following January 2, 1959:

1. Marks' return to Cuba in the early part of January 1959;

2. Marks' resumption of activities in the Rebel Army shortly after his return in January 1959;

3. Marks' continuance in the Rebel Army from January 1959 to May 1960.

A review of each of these circumstances, when measured by *Nishikawa*, makes it clear that Marks' alleged military service after January 1959 was not voluntary.

1. Marks' return to Cuba in early January 1959.

In the early part of November 1958, Marks left combat duty to obtain medical treatment for wounds received to his knee and ankle (R. 148a). Unable to obtain proper medical attention for him in Cuba, the Rebel Army arranged for Marks to fly to Key West, Florida, for such treatment (R. 148a-149a). Sometime in the first week of January, Marks left Key West or Miami to return to Havana (R. 149a-150a).

During the period that Marks was out of Cuba, Batista fell, Castro entered Havana, and the military phase of the revolution was at an end. When Marks returned to Cuba there were no longer any hostilities in progress.

Marks testified, without contradiction, that when he returned to Havana he considered that the "war is over" and that he was returning "for a reunion with friends that I fought with during the revolution" (R. 150a). It was the uncontradicted testimony of Marks that he had no intention, when he returned to Cuba, to return to military service since that activity was already at an end. The Court can, perhaps, best gain insight into Marks' motives for returning to Cuba by extensive quotation from his testimony:

> "Q. Now, I'm going to ask you, Mr. Marks, to reconstruct for the Hearing Officer as fully and as completely as you can, your state of mind in the early part of January 1959 relative to your return to Cuba? A. Well, when I left Cuba with wounds in my leg, which I previously had told, that it was severely infected, upon leaving the group, I had received orders that upon completion of cure of the wounds I was to report back to Che Guavara. After the wounds were healed, which were paid for by the Revolutionary—revolution, and they also took care of me and took great care with great jeopardy to other people in getting me out of Cuba. And so I felt—I have thought of it as very thoroughly since Monday—and I wish to stress that I did have an obligation because they did pay for my medical attention, they did get me money, of assistance, during the time of recuperation. So, therefore, I did have an obligation to report back. But when I —in January the war was over, there was peace— I considered at that time that it was all finished, and I would go back and have a complete reunion with the men, who I had fought with. Also I wish to bring out a point which hasn't been brought out before—as the Court probably knows, I have been poor all my life. I have never had nothing—too much, and according to the rules of the Revolutionary government that through the agrarian re-

form, their land would be given—unused lands or government owned land would be given to the poor. And as Fidel also stated in the mountains, that men serving in the Revolutionary government would have a preference, a priority in receiving said tokens of land, if they had nothing. I have dealt slightly with agriculture and through information and seeing what is possible in Cuba in the reform of agriculture, I found agriculture could be a very lucrative income, and it was my intent to get a portion of this land and also begin in setting up my own farm and plantation, where I could have secure and permanent income. As many Americans who have land and property in Cuba also receive a very lucrative income from said property—I don't recall the name of the man at this instance, but he did have a plantation—coffee plantation in the Sierra Maestra, and his yearly income from that plantation was $85,000 a year. So, I'm sure the court can understand that my desire to get a part of this land which is virgin land, which would have required a great deal of work to clear, but complete it would have been a very lucrative and very beneficial for a future. And to maintain it it would not require permanent residence in Cuba, as I am sure that you know many Americans own property in Cuba and spend practically no time in Cuba whatsoever—and still receive a very lucrative income.

Q. You mean used to? A. Used to.

Q. Now—I'm sorry—have you finished your answer? A. No. And I considered that being as it was under the Revolutionary Law, at the time that there would be a complete democratic country and once free elections has been established, it would return to a very prosperous and fertile business.

* * *

Q. Now, Mr. Marks, at the time of your return to Cuba in the early part of January 1959, did

you return for the purpose of engaging in any military activity? A. No, I didn't.

Q. To your knowledge, was there any military activity going on? A. No.

* * *

Counsel to Respondent:

Q. Did you intend to go back to perform any combat duty? A. No.

Q. Did you go back with the intention of being a soldier? A. No.

Q. Did you go back with the intention of serving in the Cuban Army? A. No.

Q. Did you go back with the intention of serving in the Revolutionary Army? A. No.

Q. Did you understand that the Revolutionary Army would continue with any kind of military activities upon your return? A. No I didn't. I was under the interpretation that the revolutionary forces would be nonparticipant unit, only as a police unit, until a free election." (R. 187a-190a)

In *Nishikawa* the finding of the trial court, which was not disturbed by this Court, was that Nishikawa, a national of Japan, had returned to Japan with the intention and expectation of being drafted. Nishikawa was a Japanese national, returning to Japan in 1939, knowing that he was subject to conscription in the Japanese Army, and knowing that Japan was conscripting its nationals. According to the trial judge, Nishikawa "went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army * * *. He went over and he waited until they reached him on the draft, and when they did he was drafted" (356 U. S., at pp. 132-133). It was nevertheless held that Nishikawa's subsequent service was not voluntary and therefore not expatriating.

Similarly, in *Podea* v. *Acheson*, 179 F. 2d 306 (C. A. 2), a native-born American who had been brought as a child to Roumania by his Roumanian parents, returned to the United States as a reporter, and then went back to Roumania where he was inducted into the Roumanian Army. Although Podea could have remained in the United States either as a citizen or as a permanent immigrant, his return to Roumania and induction there were held no basis for his expatriation. And in *Pandolfo* v. *Acheson*, 202 F. 2d 38 (C. A. 2), a native-born American brought to Italy as an infant by his Italian parents, who served two tours of duty in the Italian Army and took an oath of allegiance to the King of Italy, was held not to have been expatriated although he had an American passport and could have left Italy for the United States.

As compared with the facts in the governing cases, and particularly *Nishikawa*, the petitioner's return to Cuba when hostilities were at an end, without any intention of engaging in any military service, and without any knowledge or belief that he, as an American citizen, could or would be impressed into the military service in Cuba, forecloses the use of such return as a basis for expatriation.

2. Impressment of Marks into service in the Rebel Army in January 1959.

Upon Marks' return to Cuba he sought out Che Guevara, his former chief (R. 151a). With Che Guevara he went to La Cabana—that was the place where "all the men I served with in the Sierra Maestra were stationed" (R. 151a). Marks stayed overnight at a room in Guevara's home, had breakfast with Guevara, and promptly thereafter was told to perform certain duties at La Cabana (R. 151a-152a): "he just told me—you're going to take over such and such a job—and that's it" (R. 152a). When asked why he complied with the order of Che Guevara—who stands second in power in Cuba only to Castro

the petitioner testified: "No one refuses an order from Che Guevara, believe me" (R. 152a); "you would find a million dollars faster by putting your head through that pillar than refusing Che Guevara" (R. 153a); "that is plain suicide by refusing an order from Che Guevara" (R. 153a). Marks plainly was not at liberty to refuse the order of Che Guevara, particularly since Marks still considered himself, at the time, a member of the Rebel Army (R. 152a-153a).

Guevara's conscription of the petitioner by fiat was, for present purposes, the equivalent of the Japanese conscription of Nishikawa by law. This Court has recognized and held that the directive of a high official has the same coercive effect as a duly promulgated law and compliance with the former is no less the result of coercion than compliance with the latter. *Lombard* v. *Louisiana*, 373 U. S. 267. Enforced compliance can be achieved "by an official command which has at least as much coercive effect as" a formal law (*id.*, at p. 273). Here the ultimate issue on the question of voluntariness is the petitioner's state of mind, and not the technicality of legal amenability to conscription laws.

Nishikawa, receiving a draft notice in the mail, was under no greater state of compulsion than was Marks when he received a direct and personal order to duty from one of the highest and most powerful figures in the Cuban revolutionary force. Viewed realistically, Nishikawa had more time for deliberation and more opportunity for exploring alternatives than Marks had when confronted with a directive from Che Guevara. If it was involuntary service for Nishikawa to obey a notice received through the mail, it was likewise involuntary for Marks to have accepted the command uttered in his presence by a revolutionary leader with unlimited powers and addressed to an individual who still considered himself subject to the orders of his superior. It will, of course, be remembered that Nishikawa was a

dual-national, not confronted with the prospect of statelessness—a circumstance pointing to the need here of a construction of the law and facts even more favorably to Marks than to Nishikawa.

3. Marks' service in the Rebel Army from 1959 to May 1960.

That Marks, a captain in the Rebel Army, had no option but to serve in the Rebel Army after his return to Cuba in 1959 is clear from the proof.

Marks testified, without contradiction, that he requested permission to leave the Rebel Army after January 1959, but was denied such permission (R. 191a-192a). Any efforts at self-help in this regard would have constituted counter-revolutionary activity or desertion punishable by death, and Marks was fully aware of this situation (R. 131a-132a, 192a). Marks testified that he was not at liberty to leave the Rebel Army without the prospect of imprisonment or execution; he stated his understanding that if he left the Rebel Army without permission the consequences would be "for my desertion—the penalty for desertion was imprisonment or death by the firing squad" (R. 132a). Those men who had attempted to leave, according to Marks, "are now serving prison terms of up to ten years" (R. 160a).

In this respect it is noteworthy that our State Department commented that:

> "* * * Maj. Huber Matos Benitez, revolutionary commandante of Camaguey Province, was a hero of the Sierra Maestra. When Major Matos challenged the spread of Communist influence and requested permission to resign from the army, he was put on trial for conspiracy, sedition, and treason and sentenced to twenty years' imprisonment. * * *" (R. 288a).

Every witness who was questioned on the matter, the Service's witnesses as well as petitioner, testified that leaving the Rebel Army without permission amounted to the grave and punishable crimes of desertion and counter-revolution (R. 132a, 160a-161a, 190a-192a, 208a, 213a-214a, 218a, 230a), irrespective of whether the deserter was American or Cuban (R. 211a-213a). Various notices concerning desertion appear in the Official Gazette for July 13, 1959 which is Exhibit 14 at the Service hearing. And in the case of petitioner, the threats to his life when he finally sought to escape from Cuba (R. 133a-134a) confirm that his service in the Rebel Army was obligatory, not voluntary.

The fact that Marks made no effort prior to May, 1960, to escape from the Rebel Army or Cuba is, of course, not significant. No such proof was proffered or required in *Nishikawa* or in any other case on the subject. It is enough that Marks' continued service was mandatory under the laws and practices governing desertion. For in such circumstances his service was, under the cited authorities, involuntary and, therefore, no grounds for expatriation.

Nor is it required by the cases that, as was suggested below (203 F. Supp., at p. 394), expatriation follows for failure to lodge complaint with the American consul against conscription or continued service. In *Nishikawa* it was specifically observed that the "petitioner did not protest his induction or attempt to renounce his Japanese nationality, to return to the United States or to secure the aid of United States consular officials." (356 U. S., at pp. 131-132.) The pertinency of the *Nishikawa* ruling here is clear from the uncontradicted testimony of Marks that many Americans in Cuba who had requested aid of the consular offices had received no help (R. 164a-165a).

It is, in any event, unnecessary to demonstrate that Marks' activity with the Cuban Rebel Army from early January 1959 to May 1960 was solely and exclusively caused by physical coercion or fear of the consequences for deser-

tion. It is enough, as we have indicated, that a *bona fide* fear of disastrous consequences was a contributing factor to Marks' stay in the Rebel Army. Such a circumstance, if present and contributory, is sufficient to render Marks' service in the Rebel Army involuntary under the applicable authorities. Under this standard the proof fully and amply sustains a finding of involuntariness; at the least, the record raises sufficient doubts on this score so that it was inconsistent with *Nishikawa* to find that the heavy burden of proof here imposed upon the respondent had been met.

B.

Marks never served in "the armed forces of a foreign state" as those terms are used in § 349(a)(3)

§ 349(a)(3) prescribes loss of citizenship for service in the "armed forces of a foreign state" irrespective of whether the individual concerned is a national of that foreign state; § 349(a)(4), on the other hand, denationalizes for employment by a foreign state of which one is a national. Since the statute thus distinguishes between service in an armed force and other forms of employment, it is here important to define exactly the term "armed forces" as used in § 349(a)(3). For unless Marks served in an "armed force" as distinct from other foreign employment, denationalization would not be permissible.

Not all employment involving the use of arms constitutes service in an armed force. Police, prison guards, correction officers, peace officers, etc., all carry and may use arms, yet are plainly not members of an "armed force". An armed force is characteristically an armed body of men organized for the purpose of waging or preparing to wage war. The word "army" derives in part from the term "armata" meaning "armed force". 1 Century Dict. (1914 ed.) 315. The equation of the terms "armed forces" and "military" is demonstrated in 2 Encyc. Brit. (14th ed.) 396 which defines "army" as a "considerable

body of men armed and organized for the purpose of warfare on land * * *, or the whole armed force at the disposal of a state or person for the same purpose * * * ". The federal statute defining "armed force" has exclusive reference to the Army, Navy, Air Force, Marines, or Coast Guard [10 U.S.C.A. § 101 (4)].

Accordingly, in *United States* v. *Kenny*, 247 F. 2d 139, 143 (C. A. 2), the identification of the term "armed forces" solely with the Army, Navy, Air Force, Marines, or Coast Guard was held so clear that

> "The contention that service with the National Guard constitutes service in the Armed Forces of the United States for purposes of Section 315 of the Immigration and Nationality Act is preposterous."

Similarly, it has been held that neither the Canadian Officer Training Corps [*In the Matter of O.*, file =56108/718 (BIA, 1942); *In the Matter of Z.*, 2 I & N Dec. 346 (1945)] nor the Queens University Air Reserve [*In the Matter of L. F.*, 2 I & N Dec. 455 (1946)] is an "armed force" for purposes of denationalization. In *Matter of Z.*, *supra*, at p. 350, it was pointed out that the statute contemplates "only service in that part of a foreign army which is activated or subject to active military duty * * *."

The official documents here in evidence, as well as the oral testimony, establish that in the period of time here in issue following January 2, 1959, and after the termination of hostilities between Castro and Batista, the Rebel Army was not an "armed force" as hereinbefore defined and understood.

A fair reading of the record will show that when, on January 1, 1959, the Rebel Army under Castro had concluded the rout of the Armed Forces of Cuba under Batista, the military function of the Rebel Army was at an end. There is no proof that the Rebel Army thereafter engaged in any combat or other distinctively military

activity. Instead the untrained, revolutionary, peasant force which, as the Rebel Army, had made the revolution (R. 93a, 121a, 122a), became the militant, but not military, core of the effort to consolidate, implement, and safeguard the revolution. In this endeavor the personnel and ranks of the pre-January 1, 1959 format were retained, but the function shifted from the conduct of a revolutionary military war to revolutionary social and economic reconstruction.

One recent authoritative analysis of the non-military nature of the post-January 1959 Rebel Army observed:

> "*Armas? Para qué?* Castro's question of January, 1959, has long since been laid to rest in the vast cemetery of betrayed ideas beside the slogan that was soon to follow: 'The revolution makes barracks into schools.'" (Leo Sauvage, Castro's Foreign Legion, 27 The Reporter, No. 5, Sept. 27, 1962, p. 21.)

> "From the very start * * * Fidel Castro took great care to place strict limits on the role and the powers of his troops in olive green [the Rebel Army]. Perhaps he simply wanted to prevent the national army from becoming so powerful that it might some day follow the unhappy precedents set by so many Latin-American armies, including Batista's Cuban 'army of sergeants.' More probably Castro mistrusted the Ejército Rebelde [Rebel Army] for much more immediate reasons * * *

> "Distrusting his national army, Castro founded a militia, in whose training political indoctrination took on at least as much importance as the manual of arms * * *. [I]n general the companies of *barbudos* who had brought Castro to power ended by being downgraded into working parties, trusted only to carry shovels rather than guns." (*Id.*, at p. 22.)

The record here fully supports the foregoing evaluation of the post-revolutionary status and function of the Rebel Army.

§ 349(a)(3) is premised upon service in "the armed forces" of a foreign state. But the Rebel Army was never known as the Cuban Army or the "Armed Forces" of Cuba. These designations were, in the post-revolutionary Cuban lexicon, reserved for the army of Batista for the period prior to the dissolution of the Cuban Army in October, 1959 (R. 90a, 256a-257a, 277a-279a); after October, 1959 it was intended to establish the "Revolutionary Armed Forces", an organization to be distinct from the Rebel Army (R. 268a-275a); during neither period was the Rebel Army designated the Cuban Army or the "Armed Forces" of Cuba.

The record here further establishes that the Rebel Army never had a confluence of *de facto* and *de jure* status as a military agency. During the revolutionary period the Rebel Army could not, of course, attain a *de jure* status. On January 13, 1959, after the overthrow of Batista, the organic law establishing the "Armed Forces"—Batista's army—was suspended by Law No. 13 (R. 256a-257a), but according to the Service's expert witness, Law No. 13 did not dissolve the former Cuban Army (R. 91a, 97a). That Army remained in being as the "Cuban Army" until its dissolution by Law No. 600 of October, 1959 (R. 99a, 270a). The Service's expert witness explicitly testified that prior to Law No. 600 of October, 1959 the Rebel Army "did not have that legal status" (R. 104a). Another Service witness observed that the regular army continued to function up to October, 1959 while the Rebel Army "had an awkward position, because we had authority, we made arrest, we represent the government as authorities and, yet, officially, we weren't regular army" (R. 223a). And the same Law No. 600 which, in October, 1959, recognized the existence of the Rebel Army, purported to dissolve all pre-existing military agencies and to reorganize them as part of the new Ministry of the Revolutionary Armed Forces (R. 268a-269a).

It is most significant that not until October 1959 did the Rebel Army acquire even the semblance of legal status. For it was precisely then, according to another Service witness, that the state militia was formed (R. 226a). The report of the United States State Department of April 4, 1961 specifies the role which the militia played in post-revolutionary Cuba:

> "The history of the Castro revolution has been the history of the calculated destruction of the free-spirited rebel army and its supersession as the main military instrumentality of the regime by the new state militia" (R. 287a).

The accuracy of this description of the militia "as the main military instrumentality of the regime" was confirmed by one of the Service's witnesses, who testified that the militia was formed to engage in "war training" (R. 227a), in which capacity the militia served "all through Cuba" (R. 230a). This same witness, who had served in the Rebel Army, testified:

> "Q. And what was the distinction between the state militia and the Rebel Army? A. Well, our function was rather like a police, like a military police, or something like that.
>
> Q. That was the function of the Rebel Army? A. More or less" (R. 227a).

Juxtaposed to the described failure to accord the Rebel Army legal status until the establishment of a state militia which would perform the military function in post-revolutionary Cuba, is the careful and inspired confinement of the Rebel Army to patriotic but non-military duties.

In Law No. 100 of February 23, 1959, the post-revolutionary nature and function of the Rebel Army were delineated in the legislation's preamble as follows:

> "WHEREAS: It is necessary to prove with repeated actions the firmness of our revolutionary

struggle; the firmness of our love for the national territory; the firmness of the promises signed with blood in the battlefields; the full solidarity of the Rebel Army with the peasants and the people, in order to reaffirm and prove at the time of the Revolutionary Government that it is and it will continue to be a vehicle for the defense and betterment of the citizenry.

WHEREAS: Having won the war of bullets, it is now necessary to win the war of peace, and the Rebel Army being formed mostly by the same peasants who waged the guerrilla war against the dictatorship they overthrew, nothing is fairer than to employ in a revolutionary work, those who were directly affected by the evils they fought against and fighting which a lot of their fellowmen died.

WHEREAS: A sure means of keeping the morale in the Revolutionary ranks, is to engage the Rebel Army in creative tasks for the benefit of the citizenry reaffirming in this manner their civic and not their military calling" (R. 261a).

"WHEREAS: The Rebel Army cannot, has been unable to and shall not be able to live with the back turned on the peasants' problems of all kinds and on those of the poor and working classes of our country and has fought and will continue to fight for a change in the social regime of traditional misery and lack of culture of the Cuban people, and it brings as a battle banner the Agrarian Reform, as a means for obtaining improvement in the life level of the peasant and of the working people, ending in this manner and on this basis the dreadful problem of unemployment" (R. 262a).

"And, inasmuch as throughout the articles of Law No. 3 on Agrarian Reform, issued by the Office of the Commander General of the Rebel Army in the Sierra Maestra, is stipulated the development of forests wealth, dam construction and impounding of river waters for irrigation and utilization of power for the production of hydroelectric energy, construction of schools, medical dispensaries, official agencies for the technical and financial aid to peasants, sports

field and farmhouses or agricultural experimenting centers, buildings or houses for living quarters, and in everything it refers to assistance of all kinds to be given to the peasants and their families and to the victims of the war against the dictatorship and their relatives" (R. 262a-263a).

Law No. 100 then proceeds to provide in its Article 1 that:

"The following departments of the Rebel Army are hereby created, to be assigned to the Ministry of Defense:

(1) Department of Technical, Material and Cultural Assistance to the peasant.

(2) Department of Construction of Peasants' Homes.

(3) Department of Reforestration.

(4) Department of Construction and Organization of Groups of Schools.

(5) Department of Commercial and Industrial Associations and Cooperatives for Consumption and Production of Agricultural Products.

(6) Department of Beaches for the People.

(7) Department of Assistance to War Victims and their Relatives" (R. 259a).

It was, therefore, early established that following the revolution the Rebel Army was to be converted from an instrument of revolutionary warfare to one of revolutionary reforms and reconstruction. It bears repetition that the declared intention of the law was "to engage the Rebel Army in creative tasks for the benefit of the citizenry, reaffirming in this manner their civic and not their military calling".

Law No. 600 of October 16, 1959, by which the "Armed Forces" were dissolved and the new "Revolutionary Armed Forces" were formed, contains the most striking proof of

the non-military nature of the Rebel Army in post-revolutionary Cuba. After Law No. 600 extols the virtues of the Rebel Army in the most extravagant terms in its preamble (R. 269a), Article 9 of Law No. 600 provides that persons drafted into active service in the Armed Forces would, for purposes of seniority and retirement, receive credit for time "fighting against the dictatorship", time "served in the dissolved Army", time served as a political prisoner prior to December 31, 1958, etc.—but no credit for time served in the Rebel Army after January 1, 1959 (R. 271a-272a). In this manner it was officially made clear that after January 1, 1959 the Rebel Army was not engaged in a military capacity.

The proof of record concerning the actual work done by the Rebel Army in and after 1959 leaves little doubt of the "civic and not (the) * * * military calling" of the Rebel Army starting in January, 1959. In its principal aspects, the work of the Rebel Army after January, 1959, resembled the "incidents of a war economy", organized and directed by government, which were held not to be foreign government or military service for purposes of denationalization in *Kawakita* v. *United States*, 343 U. S. 717.

Not one witness or exhibit suggests that any combat duty was performed by the Rebel Army during the period in issue. Marks testified that, starting in January, 1959, the Rebel Army was engaged in no maneuvers, no drills, and no training in combat duties (R. 121a-122a, 123a, 125a, 192a-193a). In this testimony he was corroborated by two witnesses offered by the Service (R. 200a-201a, 228a-229a). Marks also testified that men under his command constructed schools and cleared beaches (R. 176a-178a). The Service's witness, Gonzalez, testified on this score as follows:

> "Q. Would you describe the kind of work that the Rebel Army did after January, 1959? A. Well, one part is in the quarters, barracks, other parts are

> in labor battalions, building houses and building roads. Another part is in the agriculture—agrarian reform, land reform, reparation and river works." (R. 201a).

Another Service witness, de la Torre, testified on redirect examination that the Rebel Army was "engaged in work on reforestration", "construction work as relates to schools", planting trees, and building roads (R. 232a-233a).

The attempt of the District Court to discount the significance of these post-January 1959 functions of the Rebel Army by reference to the civilian and construction activities of the United States Army (203 F. Supp., at p. 394) fails to meet the issue raised by the proof here. The United States Engineering Corps performs its construction functions as an incident to its military activities and objectives; starting in January, 1959, pursuant to Castro's carefully conceived pattern of diverting the "free-spirited" and distrusted Rebel Army from military functions and power to enterprises less threatening to Castro's hegemony, the Rebel Army was engaged almost exclusively in reconstruction and police activities, and performed no typically military duties to which its "civic" functions were incidental or subordinate.

In the last analysis the armed forces of a state comprise that establishment which has the function of waging war. An armed force is, therefore, recognizable as a body of men engaged in either waging war or preparing to wage war. Uniforms, arms, commands, etc., are characteristic of various non-military as well as military agencies. Only waging war or preparing to wage war distinguishes an armed force. By these decisive criteria the respondent's proof here necessarily fails.

The Rebel Army waged no war from January 1959 to May 1960. And the totality of the respondent's proof of

preparation for war by the Rebel Army during that period comes to the following:

> "*SIO to Witness Gonzalez*:
>
> "Q. You haven't answered my question. I am interested in knowing whether you observed any members of the Rebel Army who did receive military instruction or did engage in military maneuvers after January 1st, 1959. A. I have seen soldiers in marching, training and also in parading.
>
> Q. When? A. That was in the first month of the revolution, to teach those Rebel soldiers who didn't know how to parade in military formation." (R. 245b).
>
> "Q. You continued. In what manner? A. [Ball-Llovera] When Fidel Castro took over, I had to wait in Operations for two or three months, and report every so often, then, after that, I was called as a teacher to the—in the—infantry, to the base of San Antonio de los Banos, known as the base of Cayuga. I was appointed by Captain Achiles Chinea.
>
> Q. What kind of appointment did you receive? A. Simply to teach the soldiers how to drill in close drill" (R. 249b).

The record reveals no further proof of activities by the Rebel Army after January 1959 constituting preparation for war.

Marks' testimony that the Rebel Army engaged in no military maneuvers, drills, or training (R. 121a-122a, 123a, 125a, 192a-193a) was forcefully corroborated by Service witnesses:

> "Q. Now, Mr. Gonzalez, during the period that you served in the Rebel Army, following January 1, 1959, did you ever engage in any combat duty? A. I can't talk about combat duty because there was no war.
>
> Q. Now, during the period after January 1, 1959, did he—and prior to the time that he left Cuba, did he ever engage—

SIO: Excuse me, counsel—'you'—please.
Counsel: Yes.

Counsel to Witness Gonzalez:

Q. Did you ever engage in any kind of maneuvers, military maneuvers? A. No, and I didn't even receive military instruction, training.

Q. During the period after January 1959, did he ever engage in any kind of drills and—of a military nature? A. No, not me" (R. 200a).

"Q. Did you personally ever engage in any combat duty after January 1, 1959? A. [de la Torre] After?

Q. Yes. A. No, sir.

Q. Did you ever engage in any military maneuvers? A. No, sir.

Q. Did you ever engage in any military drills? A. No.

Q. Did you get any military instruction? A. No" (R. 228a-229a).

We know of no instance of an armed force which does not train its men in the art of war. An armed force exists to wage war, and cannot serve its disinctive function if it does not prepare personnel and equipment for fighting. Here the issue posed was whether the Rebel Army was an armed force. The Service produced numerous witnesses associated with the Rebel Army in an attempt to demonstrate an affirmative answer to the issue. Yet the record is wholly lacking in proof of the single, universal aspect of armies—training for war. This void is, of course, not the product of any oversight; it is, rather, a striking affirmation of the declaration of February 23, 1959 in Public Law No. 100 that after January 1959 the Rebel Army was assigned a "civic and not * * * [a] military calling" (R. 261a).

The conclusion of the District Court that the Rebel Army was the "Armed Force" of Cuba (notwithstanding the conclusive documentary evidence that the term "Armed

Forces" was never identified with the Rebel Army) is based largely upon the *indicia* of military rank, insignia, identification cards, uniform, chain of command, pay, and arms. Even in these matters the record is unclear as to the existence of military forms—the issued uniforms were established as fatigues, better suited to laborers than soldiers, and on many occasions civilian clothes and not any uniforms were worn (R. 206a, 211a, 219a-220a); no single type of hat was issued or worn (R. 209a-210a); payment of salary was uncertain (R. 173a, 194a); duties were vague (see Ex. 1, Tr. 503-504); and the chain of command was unsettled (R. 122a, 125a). But the more serious error below on this matter was the uncritical deference to the alleged forms of the military perceived in the Rebel Army while disregarding the far more significant consideration that, starting in January, 1959, the work and functions of the Rebel Army were explicitly "civic and not * * * military." Just as neither rank, nor chain of command, nor uniform, singly or in combination, make the Boy Scouts, or the Salvation Army, or Police or Fire Departments the equivalents of an "Armed Force," so do those same characteristics fail to transmute the post-January 1959 Rebel Army into a military establishment.

Nor can the post-revolutionary Rebel Army be considered as the body of men who would take to arms if war came. As indicated at pages 57-59, *supra*, the state militia and not the peasant-formed Rebel Army was the post-revolutionary military force of Cuba. In any event, even if the Rebel Army was a reserve military body, the ruling in *United States* v. *Kenny*, 247 F. 2d 139, 143 (C. A. 2), establishes that a reserve force, such as the National Guard, is not an armed force.

All that has been said here concerning the Rebel Army generally has particular application to Marks' post-revolutionary Rebel Army duty and experiences. Without exception, starting in January, 1959, Marks' work consisted of

police and security functions (R. 120a-126a, 154a-155a, 157a, 162a)—functions to which a pistol, a uniform, and a rank were all appropriate. There is no competent testimony that Marks engaged in any activity typical of military establishment—there was no military action, training or instruction; no maneuvers or drills, no salutes; and only the most meagre semblance of a uniform.[7] Whether serving as a prison officer, or a rural guard, or a security officer, Marks was at no time engaged in a function directly or indirectly related to the waging or preparation for the waging of war.

The record here demonstrates a total absence, on and after January 2, 1959, of service by Marks in a military organization or the performance of military service. But if the record is not as clear on this score as we maintain, then it must be remembered that the burden of proving that Marks' post-January 1959 activity was military in nature rests with the respondent, and that that burden must be met by clear, convincing, unequivocal, and even overwhelming proof. See, *e.g.*, *Lehmann* v. *Acheson*, 206 F. 2d 592 (C. A. 3). Such a burden has patently not been sustained. If no more than the official documents, Laws No. 100 and No. 600, be read, serious doubts must be acknowledged as to whether the Rebel Army was engaged in military and not civic functions. And since " 'Rights of citizenship are not to be destroyed by an ambiguity' " (*Kawa-*

[7] The Service and apparently the Courts below relied heavily upon an article in the December, 1960 issue of "Cavalier" magazine, to establish that Marks had made admissions therein of service in an armed force. Much of the language of the Court of Appeals purporting to describe petitioner's activities comes from that article. It should be noted that the article was not offered and was not admitted for such purpose, the Service having refused to offer the article for the truth of its contents (R. 180a-185a). Marks pointed out that the article was not in the form he had originally approved (R. 183a). In any event, while the article refers to certain military forms, it does not establish the military activity necessary to the respondent's case.

kita v. *United States*, 343 U. S. 717, 728), all doubts on this issue must be resolved in favor of Marks [*Kenji Kamade* v. *Dulles*, 145 F. Supp. 457, 458-459 (D. Cal.) (Weinfeld, J.)]. The failure of the Courts below to do so is in conflict with the decisions of this Court.

V

The finding of the Court below that the petitioner, if an alien, is deportable constituted reversible error.

The petitioner was arrested and detained as an alien allegedly deportable on the grounds that he was excludable because of his conviction in 1952 of a crime involving moral turpitude and, further, because at the time of his entry into the United States in July, 1960 he did not possess the entry documents required of an alien. The District Court rejected both grounds; the Court of Appeals sustained the second and did not consider the first.

A.

The ruling below assumes, of course, the power of government to deport a native-born American rendered stateless in the absence of an express renunciation of American citizenship or allegiance. Such a power to banish has never heretofore been sustained in American jurisprudence. To the contrary, in that portion of the dissenting opinion of Chief Justice Warren in *Perez* v. *Brownell*, 356 U. S. 44, which was not controverted in the majority opinion, the Chief Justice pointed out:

> "Even if Congress can divest United States citizenship, it does not necessarily follow that an American-born expatriate can be deported * * *. Since the deporting power has been held to be derived from the power to exclude, *Fong Yue Ting* v. *United States*, *supra*, it may well be that this power does not extend to persons born in this country. As to them, deportation would perhaps find its justification only

> as a punishment, indistinguishable from banishment. See dissenting opinions in *United States* v. *Ju Toy*, 198 U. S. 253, 264; *Fong Yue Ting* v. *United States*, *supra*, at 744." (356 U. S., at p. 65, n. 6)

It is, accordingly, the petitioner's basic premise that there is no power to deport Marks even if he be deemed to have been denationalized.

B.

The law governing the requirement of entry documents of a citizen subsequently denationalized is set forth fully in *Matter of W*, 5 I & N Dec. 759. That case establishes that the relation-back doctrine in the instance of denationalization is inapplicable to documentary matters. The rationale is clear: one who is a citizen at the time of entry, though subsequently denationalized for reasons dating back prior to the entry, obviously cannot be required to obtain and possess at the time of entry the entry documents required of aliens. Until denationalized, the citizen could not have known he was an alien and could not have been expected to apply for papers issued to aliens.

In *Podea* v. *United States*, 179 F. 2d 306 (C. A. 2), where the native-born American of Roumanian parents had served in the Roumanian Army, it was held that his failure to come to the United States as an immigrant prior to induction in the Roumanian Army was no grounds for expatriation, Judge A. N. Hand saying that if the petitioner had so assumed immigrant status

> "* * * he might have had to meet the claim that he had conceded Roumanian citizenship and be confronted by a concession of serious if not fatal character." (179 F. 2d, at p. 309.)

The foregoing principle has direct application here. At least until the proceeding in the Immigration Service was at an end, there can have been, and there was, no competent determination that Marks was expatriated. The State Department notification to Marks of denationaliza-

tion, which was not preceded by notice or hearing, was, of course, no such determination. In fact, the Hearing Officer at the immigration hearing, declared that the State Department action is "not binding in this proceeding" and "not an adjudication of the man's alienage or citizenship" (R. 42a-44a), and the Examining Officer consented to offering the State Department notice for the limited purpose of proving "that the respondent has been served with such a certificate, without offering it for any binding effect as to the finding there contained" (R. 53a). Consequently, at the time of his entry into this country on July 22, 1960, Marks could not have sought or obtained entry documents as an alien without acknowledging an expatriation which had not then been competently determined or established. *Matter of W, supra*, settles that in such circumstances there is no excludability for lack of entry documents.

The Court of Appeals held, however, that the effect of § 349(a)(3) is to denationalize immediately upon the occurrence of the prescribed event thereby rendering the petitioner an alien for all purposes from the date of such event —a conclusion which would render him an alien (at least as of July, 1960) so as to require entry documents.[8] The short answer to this contention is that the statute does not specify that denationalization shall take effect immediately upon the prescribed event. It is, moreover, settled that, as a native-born American, the petitioner's loss of citizenship can only be established by a judicial determination of his alienage; admittedly such a determination is a jurisdictional prerequiste to any action based upon such alienage. (*Ng Fung Ho* v. *White*, 259 U. S. 276; see also au-

[8] It is not clear which entry documents would have been required of Marks or which he could have obtained. In any event, since the respondent contends that Marks was excludable by reason of his prior conviction, it is clear that if Marks had attempted to obtain entry documents as an alien in July 1960 he would have been excluded and thereby forced to litigate his claim of citizenship from abroad.

thorities and discussion at pp. 41-42, *supra*). Accordingly, until a judicial declaration of his alienage, Marks' American citizenship was unimpaired for purposes of any administrative action, including the requirement of entry documents which only aliens need procure. The principle of *Ng Fung Ho* obliterates—and for constitutional reasons—the argument that at the time of his entry into the United States in July 1960 Marks was required to concede and act as if he were an alien rather than a citizen.

The impact of the foregoing authorities is not avoided by the language of § 356 of the Immigration & Nationality Act of 1952 (8 U. S. C. A. 1488) cited by the Court of Appeals. § 356 provides that loss of nationality "shall result solely from the performance" of any of the prescribed denationalizing acts. This is read by the Court of Appeals to mean that denationalization "shall result immediately upon the performance" of any of the foregoing acts. § 356 does not lend itself to such construction. Its meaning is, rather, as indicated in *Kawakita* v. *United States*, *supra*, at pages 730-731, "that the only methods of expatriation are those contained" in the denationalization statutes.

C.

Excludability of an alien for a prior conviction involving moral turpitude is authorized by § 212(a)(9). That section, however, applies to "*aliens* who have been convicted" of such a crime. Marks' conviction occurred in 1952 when he was a citizen, and prior to the occurrence of any of the allegedly expatriating events. § 212(a)(9) is, therefore, here inapplicable.

If § 212 is read in its entirety it evidences the congressional intention that those provisions of excludability which refer to aliens shall apply only to the acts and qualities of aliens *qua* aliens. § 212(a)(22) confirms this analysis. It is there provided that excludability shall extend to

> "Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants; or persons

> who have departed from or who have remained outside the United States to avoid or evade training or service in the armed forces in time of war or a period declared by the President to be a national emergency, except aliens who were at the time of such departure nonimmigrant aliens and who seek to reenter the United States as nonimmigrant aliens and who seek to reenter the United States as nonimmigrants."

The marked difference in the manner in which § 212(a)(22) refers to "persons" denationalized for draft evasion as compared with "aliens" confirms that § 212(a)(9) concerns conviction of an alien while an alien. The Service was, therefore, unwarranted in charging petitioner to be excludable for a conviction at the time he was concededly a citizen.

Doubts on the argument under this point are resolved in Marks' favor by *Mangaoang* v. *Boyd*, 205 F. 2d 553 (C. A. 9), *cert. den.*, 346 U. S. 876. It was there proposed to deport for membership in the Communist Party pursuant to 8 U. S. C. A. 1182(28)(c) ("Aliens who are members of or affiliated with • • • the Communist Party of the United States"). The proof showed that the alleged Communist Party membership occurred while Mangaoang was a citizen of the United States, and that such membership terminated before he lost his United States citizenship as a result of the proclamation of Philippine Independence in 1946. In these circumstances, it was held that the alien was not deportable for his alleged Communist Party membership, the Ninth Circuit saying:

> "• • • • We think it was not sufficient to prove that the appellant was an alien at the time of his arrest and that he was a member of the Communist Party at some prior date on which he was not shown to have been an alien." (205 F. 2d, at p. 555)

United States ex rel. Eichenlaub v. *Shaughnessy*, 338 U. S. 521, is not to the contrary. In *Eichenlaub* naturalized citizens, whose citizenship was later revoked and cancelled

ab initio for fraud in the procurement, were held to be deportable for convictions sustained during the period of the fraudulent naturalization.[9] In writing the opinion for the Court, Mr. Justice Burton expressly stated that the case did not involve the questions which would arise in the instances of the loss of citizenship "by lawful and voluntary expatriation" (338 U. S., at p. 528 n. 14). This reservation is here highly significant in view of the contention made by Mr. Justice Frankfurter in his dissent that the decision would have serious implications with respect to citizens who might be denaturalized for reasons such as voting in a foreign election or serving in the armed forces of a foreign state (see 338 U. S., at p. 535). It is, therefore, unquestionable that the Court in *Eichenlaub* expressly withheld passing upon the issue as raised in the instant case. The authorities and the reasons cited herein remain intact and unimpaired by *Eichenlaub*, and dictate that Marks' conviction while a citizen constitutes no basis for deportation.

CONCLUSION

The judgment of the Court below should be reversed and the writ of habeas corpus prayed for should issue.

Respectfully submitted,

MURRAY A. GORDON,
Attorney for the Petitioner.

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[9] This decision was not that of a majority of the Court since two Justices did not participate in the decision and three dissented.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 253

HERMAN FREDERICK MARKS, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the court of appeals is reported at 315 F. 2d 673. The opinion of the district court is reported at 203 F. Supp. 389.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1963. The petition for a writ of certiorari was filed on July 5, 1963 and granted on October 14, 1963, 375 U.S. 810. The jurisdiction of this court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's service in the Rebel Army of Cuba for seventeen months following Castro's accession to power was voluntary service in the armed forces of a foreign state.

2. Whether Section 349(a)(3), providing for the expatriation of a native-born American citizen for voluntary service in the armed forces of a foreign state, is constitutional.

3. Whether it was proper for the administrative tribunal, in conducting a deportation proceeding, to determine whether petitioner previously had lost his American citizenship through foreign military service, and whether, in any event, he is prejudiced by the administrative determination, having now obtained a *de novo* judicial review of that issue.

4. Whether the deportation order was validly entered on the basis of petitioner's admitted entry into the United States without an immigrant visa.

STATUTE INVOLVED

The following pertinent sections of the Immigration and Nationality Act, 66 Stat. 163, were in effect at the times relevant to this case.

1. *Section 349, 8 U.S.C. 1481:*

> (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> * * * * *
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically

> authorized in writing by the Secretary of State and the Secretary of Defcase: Provided, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday.

2. *Section 101(a)(15), 8 U.S.C. 1101(a)(15):*

> The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens. * * *[1]

3. *Section 211(a), 8 U.S.C. 1181(a):*

> No immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa * * *.

4. *Section 212(a)(20), 8 U.S.C. 1182(a)(20)* also commands the exclusion of—

> any immigrant who at the time of application for admission is not in possession of a valid, unexpired immigrant visa * * *.

5. *Section 241(a)(1), 8 U.S.C. 1251(a)(1)* requires the expulsion, upon order of the Attorney General, of any alien who—

> at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

---

[1] The excepted nonimmigrant classes of aliens are not relevant here.

STATEMENT

Petitioner was born in Milwaukee, Wisconsin, in 1921. Early in 1958 he went to Cuba and joined Fidel Castro's revolutionary forces, which were then seeking to overthrow the Batista regime (R. 141a, 145a).[2] He fought in those forces throughout most of 1958, chiefly under the command of Che Guevara, one of Castro's principal commanders (R. 81b). He entered as a private but soon was promoted to the rank of lieutenant and then to captain (R. 80b–83b).

In November, 1958, petitioner returned to the United States for medical treatment of battle wounds, his expenses being paid by the revolutionary forces (R. 148a, 149a, 86b). He remained in this country, in the Miami area, during November and December. On January 1, 1959, Batista was overthrown and the Castro forces took control of Cuba. Within a few days, petitioner returned to Cuba and sought out the unit of the Rebel Army in which he had served, finding them stationed at La Cabana military fortress (R. 150a–151a, 87b). According to his account he went back to Cuba only for a "reunion" with his military comrades (R. 151a, 88b). However, it appears that he immediately began to serve again in the Rebel Army, in his rank as a captain, and continued to serve in that Army from January 1959 till May,

[2] Volume 1 of the record reproduces petitioner's Appendix in the court below, and the identifying letter "a" appears after each page reference. Volume 2, which includes some of the material in Volume 1, reproduces respondent's Appendix in the court below, and the identifying letter "b" appears after the page references. In addition, the entire record before the district court has been lodged with the Clerk of this Court.

1960, when he deserted and left Cuba (R. 121a, 152a, 89b–90b).

There are some inconsistencies in petitioner's account of his military service in Cuba in 1959 and 1960. The following facts, however are undisputed:

The day of his return to Cuba, petitioner ascertained the whereabouts of Che Guevara, his former commander, who had (and still has) one of the highest posts in the Castro government. He immediately went to the Presidential Palace or Capital building to see Che, who welcomed him cordially, put him up for the night in his own quarters, ate breakfast with him, and installed him on the following day as the officer in charge of security at La Cabana fortress, with the rank of Captain (R. 152a–154a, 171a, 89b–92b). Petitioner's principal function was to accomplish the execution of the "war criminals" condemned to death by the military tribunals set up by Castro in La Cabana (R. 158a, 99b).

Petitioner remained at La Cabana until June 1959, supervising the execution of numerous condemned "war criminals" (R. 282a, 309b). From La Cabana he was transferred under military orders to various military posts in the interior of Cuba, charged primarily with security functions (R. 162a, 123a–125a, 57b–61b). He claims that such transfers resulted from his anti-Communist activities (R. 162a, 124a–125a, 58b–59b). However, there is no evidence or indication that he was ever molested for such alleged activities. In January 1960 he was transferred to Principe Prison in Havana. Under military orders and still in his rank as Captain, he was again assigned

to security duties (R. 125a–126a, 61b). In March 1960 he was assigned to a military school to supervise the training of military police; he remained there until he left Cuba (R. 193a, 141b).

It appears that throughout his stay in Cuba in 1959 and 1960 petitioner served in the Rebel Army (sometimes described also as the Revolutionary Forces) (R. 155a, 160a, 101b); that, after January 1, 1959, this was the dominant military force of Cuba, in complete control of that country (R. 163a, 200a, 223a, 225a, 214b, 234b); that petitioner wore the olive-green uniform of the Rebel Army, with the captain's insignia of three bars or chevrons on his cap and shoulders (R. 155a, 194a, 215a, 95b, 177b); that the men under his command likewise were members of the Rebel Army and wore its uniform (R. 155a, 159a, 207a, 97b, 99b, 101b, 102b, 189b–192b); that he exercised command authority over sizable military forces, in turn was subject to command authority and received military pay emanating from the Chief of Staff of the Rebel Army (R. 154a, 157a, 162a, 173a, 192a, 193a, 56b, 97b, 124b–131b, 308b); that he was issued an identification card as a Captain in the Rebel Army by the Chief of Staff of that Army (R. 109b–111b, 280a, 328b); and that during this period he faithfully discharged the duties assigned to him as a member of the Rebel Army, including the execution of prisoners sentenced by military courts (R. 99b, 309b). Petitioner admits that he performed such service (R. 153a–158a).

In February, 1960, while he was stationed at El Principe in Havana, petitioner received a notice,

served by a representative of the United States Department of State, that he had lost his United States citizenship because of his service in the Cuban Revolutionary Army under the Cuban Revolutionary Government (R. 52a, 127a, 166a, 254a, 63b, 296b). Petitioner took no formal action challenging this certificate or seeking to have it withdrawn (R. 168a, 120b). He did state, at a press interview, that he would not give up his United States citizenship without a good fight (R. 127a, 282a). He continued to serve in the Rebel Army until he deserted in May, 1960, assertedly because he had fallen into disfavor and feared arrest (R. 132a, 186a, 70b).

After fleeing from Cuba petitioner returned to the United States. His account is that he first went to Mexico and then reentered the United States at El Paso, Texas in July, 1960, being permitted to enter on his representation that he was an American citizen (R. 133a, 71b–72b). However, two witnesses testified that in May 1960 they were members of the crew of a fishing boat which picked up petitioner and a companion from a disabled boat in the Gulf of Mexico and brought them to Tampa, Florida, where they entered without reporting to immigration officers (R. 150b–172b). In any event, it is clear that at the time of his reentry in 1960 petitioner did not have or present an immigration visa as an alien (R. 1b; see R. 18a).

After his return to the United States, petitioner's presence here and his role in Cuba became known. Petitioner contributed to this knowledge by publishing a magazine article entitled "I was Castro's Killer"

(R. 179a–186a, 308b). On January 25, 1961, immigration officers called at his home to question him. He voluntarily accompanied them to the immigration office and gave them a statement describing his activities in Cuba (R. 59a–78a, 273b–274b). He thereupon was placed under arrest by the immigration officers and deportation proceedings were commenced (R. 78a, 17a). Release on administrative bond was denied on the ground that his record of numerous arrests in widely scattered cities in the United States, including two arrests as a fugitive from justice, made him a poor bail risk (R. 24a).

Thereafter, an extended hearing was held before a special inquiry officer. Petitioner was represented by his present counsel (R. 41a *et seq.*, 1b *et seq.*). The special inquiry officer, in an opinion dated May 31, 1961, found that Marks had lost his American citizenship through his service in the armed forces of Cuba in 1959 and 1960, and that he was deportable because, at the time of his entry into the United States in 1960, he was excludable on two grounds—(1) that he was not then in possession of an immigrant visa, and (2) that he previously had been convicted of a crime involving moral turpitude, to wit, carnal knowledge and abuse (R. 330b). Petitioner appealed to the Board of Immigration Appeals, which on August 2, 1961, upheld the deportation order and dismissed the appeal (R. 366b).

After the administrative proceedings had commenced, petitioner brought habeas corpus proceedings disputing his deportability and the refusal to release him on bail. This application was denied by District

Judge Levet on the ground that the challenge to the merits was premature and that the denial of bail rested on adequate grounds. *Application of Marks*, 198 F. Supp. 40. Upon conclusion of the administrative process, petitioner instituted new habeas corpus proceedings, contending that he was an American citizen and that his detention under the expulsion order was illegal (R. 1a *et seq.*). At the hearing before District Judge Cashin both parties stipulated that, in lieu of further hearings, the transcript of the proceedings before the special inquiry officer was to be received in evidence and considered *de novo* by the court (R. 30a).

The district court, after considering this evidence, ruled that the expatriation statute was constitutional and that petitioner had lost his United States citizenship through service in the armed forces of a foreign state. However, the court found the deportation order invalid on the ground that, because no court had decreed his citizenship lost at that point, petitioner was still a citizen at the time of his 1960 reentry and thus not subject to the documentary requirements prescribed for aliens. The court of appeals reversed. It agreed with the district court that petitioner had lost his United States citizenship and that the statute was constitutional. However, it found that expatriation had occurred upon performance by petitioner of the military service designated by the statute. It accordingly concluded that he was an alien at the time of his 1960 reentry and was deportable for failure to comply with the documentary requirements prescribed for immigrants.

During the judicial proceedings petitioner was admitted to bail and he is now at large on $1,000 bond (R. 2a, Pet. Br. 11).

SUMMARY OF ARGUMENT

I

A. It is undisputed that petitioner served in the Rebel Army of Cuba from January, 1959 to May, 1960. During that time he was a Captain in that army, and was charged with important responsibilities. He wore the uniform and insignia of rank, received an identity card and pay as a Captain of the Rebel Army, commanded a substantial number of troops, was subject to command orders and exercised command responsibilities.

B. During this same period, the Rebel Army unquestionably was the armed force, or a segment of the armed forces, of Cuba. Castro assumed power January 1, 1959, and was officially named Commander in Chief of Cuba's armed forces. His Rebel Army had triumphed and it became the dominant military force supporting the new government.

Petitioner's effort to compare the Rebel Army to various nonmilitary groups ignores the actualities—that it was a military agency of a foreign state, charged with its national security, and equipped with weapons. The claim that the Rebel Army was not engaged in combat or in preparing for combat is irrelevant. All armies, including the armed forces of the United States, perform functions which, in a sense, can be said to be "nonmilitary". Those participating in such activities do not lose their status as members

of the armed forces. And petitioner himself primarily performed military duties.

C. The record unequivocally demonstrates that petitioner's military service was voluntary. He was not under any compulsion when he voluntarily returned to Cuba after Castro had taken over its government. He was not conscripted and, as an American, would not have been subject to conscription, even if there had been a conscription law in Cuba. The claim of duress was advanced for the first time at the deportation hearing, is uncorroborated by anything in the record and indeed is contradicted by the evidence (including statements made by petitioner or directly attributable to him).

The circumstances of petitioner's voluntary return to Cuba in January, 1959 also negate any suggestion of coercion. Petitioner sought out his old army unit and his former commander, Che Guevara, who welcomed him cordially and immediately assigned him to a high security position, which included the responsibility of executing condemned "war criminals". He never complained to the American diplomatic and consular officers and never sought their help, although he had frequent contact with them in the course of his duties.

II

Petitioner's service in the armed forces of Cuba expatriated him under the terms of Section 349(a)(3). The statute cannot be construed to require an affirmative intention to cast off United States citizenship. Such a construction is precluded by the language and structure of the statute, as well as its legislative his-

tory. Moreover, it is directly opposed to this Court's holdings in *Mackenzie* v. *Hare*, 239 U.S. 299; *Savorgnan* v. *United States*, 338 U.S. 491; and *Perez* v. *Brownell*, 356 U.S. 44, all of which declared that expatriation resulted from voluntary overt action, irrespective of subjective intention.

III

A. Petitioner's attempt to characterize Section 349 (a)(3) as punitive, and thus subject to constitutional mandates dealing with punishment, cannot prevail. There is nothing in the statute itself, in its legislative antecedents, or in any other material to suggest a punitive aim. A statute not penal on its face can be deemed punitive only upon an overwhelming showing that punishment was intended. *Flemming* v. *Nestor*, 363 U.S. 603, 613. There is no indication whatever of such a purpose.

The reliance on *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, and the plurality opinion in *Trop* v. *Dulles*, 356 U.S. 86, is misplaced. Both cases found, on the basis of other and different statutes and their legislative histories, that the laws there in question were designed to impose punishment.

The supposition that the statute is punitive because it may result in statelessness is unwarranted. The plurality opinion in *Trop* deemed statelessness a cruel and unusual punishment, but only in relation to a statute it found to have a punitive aim. Statelessness unquestionably is a severe and undesirable consequence and one which invites consideration under the municipal laws of the various nations. But this alone

does not make it punishment, in the constitutional sense, in the absence of an explicit penal design.

B. Section 349(a)(3) is a reasonable exercise of legislative power to deal with the twin problems of potential embroilments and impaired allegiance. Military service by American nationals in foreign armies has been of concern to our nation since the founding of the Republic. It may violate national policies of neutrality or of commitment and may lead our nation into embarrassments and perils. Moreover, military service entails even greater impairment of allegiance to this country than voting (involved in *Perez* v. *Brownell*, 356 U.S. at 50) since military service is deemed one of the highest obligations of citizenship. As shown in *Perez*, the sponsors of the 1907 expatriation statute emphasized the desire to deal with "increasing embarrassment" in our foreign relations. In the 1940 codification, which introduced the provisions for loss of citizenship through foreign military service, Congress emphasized its conviction that such service was also inconsistent with continued allegiance to the United States. In the current statute, the relationship between foreign military service and the conduct of foreign affairs is indicated in the provision for authorization of such service by the joint action of Secretary of State and the Secretary of Defense.

In providing for expatriation, Congress has adopted a reasonable method of implementing its power over foreign affairs. It reasonably concluded that in such situations "there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations". *Trop*

v. *Dulles*, 356 U.S. at 106 (concurring opinion). "The termination of citizenship terminates the problem". *Perez* v. *Brownell*, 356 U.S. at 60.

The contention that in some instances the foreign military service may be "nonembarrassing" to this country misses the point. Congress is not limited to dealing with a problem of this dimension on an *ad hoc* basis; it may legislate through reasonable and generalized classifications. *Perez* v. *Brownell*, 356 U.S. at 59–60. The classification here cannot be said to be inappropriate. Moreover, Congress has taken into account possible variances by authorizing advance approval by the Secretary of State and the Secretary of Defense. This formula properly places the assessment of the interests of the United States where it belongs, in the foreign affairs agencies of our government.

IV

A. There is no substance to the contention that expatriation can be established only by a judicial determination of alienage. The statute provides for expatriation upon the performance of the expatriating act, and this unmistakable design is confirmed in the legislative history.

It cannot be said that Congress lacks power to prescribe such a consequence. Every decision of this Court, from the earliest cases, has found or assumed that expatriation would result automatically from the performance of overt acts. Indeed, *Perez* v. *Brownell*, 356 U.S. 44, 60–61, regarded the automatic nature of expatriation as the major reason for its value in aiding the foreign affairs function. See, also,

Trop v. *Dulles*, 356 U.S. 86; *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144.

Acceptance of the view that expatriation must await a judicial ruling would strip the expatriation statutes of much of their value in implementing the foreign affairs function. On the other hand, rejection of that view still leaves the citizen with fully adequate remedies for any valid claim to American citizenship.

B. A related contention is that the Attorney General cannot pass on citizenship issues, and that when a "plausible" claim of citizenship is presented to him its resolution is exclusively a matter for the courts. Alienage, to be sure, is a jurisdictional issue in a deportation proceeding, but this does not mean that the administrative process must halt when a "plausible" citizenship claim is made. The Attorney General must determine his jurisdiction in order to complete the proceeding and arrive at a decision, at which point, of course, the party affected may seek a *de novo* determination of his citizenship claim if the administrative decision is adverse. This proposition has been settled since *United States* v. *Sing Tuck*, 194 U.S. 161.

In addition, even if petitioner's position were tenable, it would at most entitle him to *de novo* judicial inquiry; that is precisely what he has obtained in this proceeding to review the deportation order.

C. The procedure under which petitioner was interrogated and eventually arrested conformed with the statute and was entirely proper. Administrative arrests in deportation proceedings have long been authorized by statute and have been endorsed by this

Court on numerous occasions. See *Abel* v. *United States*, 362 U.S. 217. Where there is a claim of lack of probable cause for the arrest, that issue can be raised immediately by habeas corpus. Petitioner did so, but did not appeal a decision supporting the custody.

Moreover, the challenges to the arrest and detention are not relevant to the disposition of the case. The detention was ordered pending final determination of deportability. If petitioner prevails his detention will end; if he loses the deportation order will be upheld and the propriety of his arrest and detention pending determination of deportability will become moot. See *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 158.

Defects in the arrest and detention (we deny that there are any) might have a bearing on the admissibility of any evidence obtained during custody. But the only evidence possibly susceptible to such attack was a statement which was not relied on by the special inquiry officer or the district court. Petitioner's alienage and deportability were established at the deportation hearing by extrinsic evidence, unrelated to his arrest and detention.

V

Deportation was properly ordered. When petitioner lost his citizenship, he became an alien and could enter the United States only in compliance with the immigration laws. When he returned to the United States for permanent stay in 1960 he did not comply with the requirement that every immigrant must present

an immigrant visa, and consequently entered the United States in violation of law. Therefore he became deportable under Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(1).

It is not true that petitioner could not have applied for a visa without jeopardizing his citizenship claim. His title to citizenship had already been lost, and he had been notified of the State Department's view that he no longer was an American citizen. Petitioner had many remedies to test his claim that he was still a citizen, and the procurement of a visa would not have curtailed them. Instead he chose to enter the United States furtively. There is no basis for relieving him from the generally applicable requirement for an immigrant visa.

Nor did petitioner have an unqualified right of entry into the United States because he once was a citizen. Congress can fix the standards and conditions upon which aliens may be admitted to the United States. Since the deportation order here merely effectuates the power to exclude, it is not defeated merely because petitioner, who entered in violation of law, once was a citizen.

ARGUMENT

In opposing petitioner's claim to United States citizenship the Government concededly has a heavy burden. Prerequisite to any deportation decree is a finding, supported by substantial evidence, that the person charged is an alien. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149. The requirement is even more exacting when it appears that the af-

fected person once was a citizen of the United States. Under such circumstances, the decisions of this Court require that the asserted loss of such citizenship be proved by clear, unequivocal and convincing evidence. *Gonzales* v. *Landon*, 350 U.S. 920; *Nishikawa* v. *Dulles*, 356 U.S. 129.

There is no question that petitioner acquired United States citizenship through birth in the United States. However, the Government contends that he lost that citizenship by service in the armed forces of Cuba after January 1, 1959. Before addressing ourselves to petitioner's attack upon the constitutionality of Section 349(a)(3), we undertake to show that the statute applies to petitioner's case and that the strict standard of proof has been satisfied.[3]

I.

PETITIONER VOLUNTARILY SERVED IN THE ARMED FORCES OF CUBA AFTER JANUARY 1, 1959

A. PETITIONER SERVED IN THE CUBAN REBEL ARMY AFTER JANUARY 1, 1959

Although petitioner does not deny that he served in the Rebel Army of Cuba from January, 1959, to May, 1960, we note briefly the evidence identifying him as a member of that force. It is undisputed

[3] Sec. 349(c), Immigration and Nationality Act, 8 U.S.C. 1481(c), as amended by Sec. 19, Act of Sept. 26, 1961, 75 Stat. 656, changed requirements for burden of proof, specifying that loss of nationality thereafter could be established by a preponderance of evidence. However, since the administrative proceeding here was completed before this 1961 amendment, we concede, for purposes of this case, that the amended statute is inapplicable.

that during this period he was a Captain of the Rebel Army, received pay and an identity card as such, and wore its uniform with the insignia of his rank; that he was charged with various important duties, including the execution of "war criminals" condemned by military courts, the supervision of security, and the training of troops; that he was subject to command orders by military superiors, including his transfer to different posts, and that he exercised command responsibilities over substantial numbers of troops, also in the uniform of the Cuban Rebel Army. See pp. 4–6, *supra*.[4]

B. DURING THE PERIOD OF PETITIONER'S SERVICE, THE CUBAN REBEL ARMY CONSTITUTED THE ARMED FORCES OF A FOREIGN STATE WITHIN THE CONTEMPLATION OF SECTION 349(A)(1)

The record shows conclusively that petitioner and his colleagues in the Cuban Rebel Army bore arms, which were used for pacification and training, and for the execution of those condemned by the military courts (R. 158a, 159a, 172a, 215a, 218a, 221a, 123b, 186b, 187b, 212b, 245b, 311b). Therefore they certainly were an armed force. Petitioner contends, however, that the Rebel Army was not a component of the armed forces of a foreign state. We believe that contention is untenable.

Cuba's designation as a foreign state, both before

[4] The cases cited by petitioner (Pet. Br. 56) regarding inactive or reserve duty are irrelevant. It is undisputed that petitioner performed full-time, active service. *Kawakita* v. *United States*, 343 U.S. 717, is inapposite since the Court expressly found that Kawakita was serving with a private business concern and not in the armed forces of Japan. 343 U.S. at 727–728.

and after Castro's assumption of power, is not open to debate.[5] Petitioner's contention is addressed rather to the role of the Rebel Army as an agency of that state. No one has suggested that petitioner incurred any disability for his service during 1958, when the Rebel Army was an insurgent force, warring against the Batista regime. But petitioner's reentry into the Rebel Army after January 1, 1959, is quite a different matter. The assertion that during 1959 and 1960 members of the Cuban Rebel Army were not the armed forces, or a major segment of the armed forces, of Cuba utterly disregards the actual facts, which are clearly portrayed in the record.

On January 1, 1959, the Batista regime was overthrown and the Castro forces took power in Cuba. The Regular Army of Cuba was vanquished and its leaders were deposed, arrested, and in some instances executed (R. 193b, 309b). It is undisputed that the Rebel Army assumed complete power. It took over the government and systematically began to eradicate the remnants of the Batista regime. On January 2, 1959 Castro, "as Chief of the Revolution which has overthrown the tyrannical regime," was appointed "Commander in Chief of the Air, Sea, and Land Forces of the Republic of Cuba". (R. 299b).

The Regular Army of Batista was not immediately dissolved. Those of its members who were not arrested or dismissed were retained while their future usefulness was weighed. Some of them eventually were retained (R. 89a, 217a–218a, 223a–225a, 214b–

[5] See expansive definition of foreign state in Section 101(a)(14), Immigration and Nationality Act, 8 U.S.C. 1101(a)(14).

215b). But it is quite inaccurate to suggest, as petitioner does (Pet. Br. 58), that this force, vanquished and shorn of its power after January 1, 1959, comprised the armed forces of Cuba. At most it was permitted to exist, and was subordinated to the Rebel Army until both forces were merged a few months later (R. 223a, 268a). In the meantime, Castro and his chief lieutenants, including Che Guevara, were placed in command of the combined military forces. Like other defeated armies in comparable situations, the Batista Regular Army was no longer a significant factor in Cuban affairs.

The record shows that the Rebel Army was the dominant, and perhaps the only, military force of the Cuban government after January 1, 1959 (R. 163a, 200a, 223a, 225a, 215b, 234b). It controlled the weapons, forts, and military personnel, it operated the military tribunals and carried out their orders, and it was responsible for the security of the nation. Cuba would have had no effective military force after January 1, 1959 if the Rebel Army did not constitute all, or a major portion, of its armed forces. Obviously, the Castro regime did have armed forces—the triumphant Rebel Army.

Less than a week after Castro's victory, and only a few days after Castro's designation as Commander in Chief of Cuba's armed forces, the United States officially recognized the new government set up by the Rebel forces (R. 298b). The dominance of the Rebel Army soon was reflected in the decrees of the new government. Law No. 13, issued January 13, 1959, recited the "need for the urgent re-organization

of military establishments" and temporarily suspended the laws and regulations of the armed forces until such reorganization was completed (R. 256a). Law No. 100, published February 26, 1959, recited the need to consolidate and promote revolutionary gains, created various divisions of the Rebel Army, and assigned them to the Ministry of Defense to perform functions generally related to reconstruction and redevelopment of the national economy (R. 258a). An accompanying statement explained that this program was undertaken to redeem the promises made by the Rebel Army during the revolutionary struggle, that having "won the war of bullets, it is now necessary to win the war of peace", and that involvement of the Rebel Army in such civic enterprises was a "sure means of keeping the morale in the Revolutionary ranks" (R. 261a). Law 600, dated October 16, 1959, culminated this series of decrees (R. 268a). It declared that the Armed Forces as they existed before January 1, 1959 were an instrument of dictatorship, that upon "the glorious victory of the Revolution and the disintegration of the Armed Forces serving the Dictatorship, the Rebel Army inherited from them a corrupt structure", and that it was necessary to establish a new structure for the armed forces. Law No. 600 then proceeded to establish a Ministry of the Revolutionary Armed Forces having jurisdiction over all the armed forces of the nation and to dissolve the Cuban Army and Navy and constitute the Rebel Army, Air Force, Navy and National Police "as integral corps of the Revolutionary Armed Forces". Members of existing forces who had not been dis-

missed were to retain their military status. "In like manner, members of the Rebel Army and other persons rendering real and effective service in any of the Armed Forces of the Nation, shall retain their military status".

In short, Law No. 600 consummated the course of events which commenced on January 1, 1959. It completed the dissolution of the remnants of the Regular Army; it confirmed the dominance of the Rebel Army in the nation's armed forces after January 1, 1959; and it recognized the Rebel Army and other designated groups as elements of the armed forces.

This depiction of the situation in Cuba was corroborated by the testimony of a number of witnesses with first-hand knowledge. One of these, an expert on Cuban law named Dr. Mestre, testified that Law No. 600 merely recognized an existing fact, that in effect the Rebel Army was the only one in Cuba after Castro took over, and that Castro was commander of all military forces, "both of what remained of the former army, which had been more or less crumbling or demoralized, plus the new Rebel Army. It was all more or less one thing" (R. 91a). A former Captain of the Regular Army who was retained after Castro took over, one Ball-Llovera, testified that after January 1, 1959, only the Rebel Army existed as a military force and exercised authority, and that any remaining members of the Regular Army were subordinated to the Rebel Army and its officers (R. 218a). Two former Captains in the Rebel Army named Roger Redondo Gonzalez and De

La Torre similarly testified that after January 1, 1959, only the Rebel Army exercised authority and represented the Government (R. 200a, 223a–225a).

2. Petitioner's rejoinders are unconvincing. First, he asserts that the evidence of rank, chain of command, and uniforms does not distinguish the Rebel Army from the Boy Scouts or the Salvation Army. But the Boy Scouts and the Salvation Army are not an agency of a foreign state charged with its national security; nor are they equipped with rifles, bayonets, pistols, and machine guns; nor do they have squads of soldiers who execute prisoners condemned by military courts.

Petitioner also suggests that his employment was like that of a peace officer or prison guard. But again this suggestion ignores the actualities of his service in a military force, in military fortresses, and under military orders. His situation was quite similar to that of an officer under direction of the Provost Marshal General in the United States Army. See 10 U.S.C. 3039(b).

Next, petitioner argues that an armed force is "characteristically an armed body of men organized for the purpose of waging or preparing to wage war". (Pet. Br. 55). However, Section 349(a)(3) merely refers to service in "the armed forces of a foreign state" without further definition. There is no suggestion that Congress referred to armed forces only when and as engaged in particular tasks.[6]

[6] The term "armed forces" appears also without further definition, at other points in the Immigration and Nationality Act. Sec. 101(d)(1), 8 U.S.C. 1101(d)(1) (definition of vet-

Combat and preparation for combat are of course central functions of the military. It is also plain that the massive standing armies throughout the world are not today engaged in combat. In large measure they

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eran); Sec. 212(a)(22), 8 U.S.C. 1182(a)(22) (exclusion of alien draft evaders); Sec. 284, 8 U.S.C. 1354 (facilitates entry and departure of alien members of armed forces); Sec. 314, 8 U.S.C. 1425 (caption) (alien deserters ineligible to citizenship); Sec. 315, 8 U.S.C. 1426 (aliens relieved from military service ineligible to citizenship); Sec. 327, 8 U.S.C. 1438 (expeditious renaturalization of persons who lost citizenship by service in allied armies during World War II); Sec. 328, 8 U.S.C. 1439 (special naturalization benefits for alien veterans); Sec. 329, 8 U.S.C. 1440 (caption) (special naturalization benefits for aliens with active service in armed forces during World Wars and Korean hostilities); Sec. 337, 8 U.S.C. 1448 (oath of allegiance, permits conscientious objectors to agree to perform noncombatant service in armed forces); Sec. 349, 8 U.S.C. 1481 (par. (3) involved here; pars. (8) and (10), which deal with loss of citizenship for desertion and avoiding military service in the "military, air, or naval forces of the United States" were declared unconstitutional by this Court in *Trop* v. *Dulles*, 356 U.S. 86 and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144); Sec. 354, 8 U.S.C. 1486 (relief from loss of nationality of certain alien veterans residing abroad).

The term "armed forces" is also used in many statutes other than the Immigration and Nationality Act, generally dealing with the armed forces of the United States. See Index to United States Code, 1958 Ed., and Supplements, "Armed Forces". In some instances the term is defined (usually as including the Army, Navy, Air Force, Marine Corps, and Coast Guard). (10 U.S.C. 101(4); 22 U.S.C. 2403(b); 26 U.S.C. 7701(a)(15); 32 U.S.C. 101(2); 50 U.S.C. App. 466(c); see broader definition in 36 U.S.C. 945); in other instances it is undefined (see 12 U.S.C. 1748 h-1); cf. 12 U.S.C. 1748(f). In at least two other instances statutes have referred, without definition, to the armed forces of a foreign state (50 U.S.C. App. 456(a) (exemption from selective service obligations); 19 U.S.C. 193a (now repealed) (exemptions from customs liability)).

are presently useful as a symbol of power and a deterrent to aggression. Various nations use their armed forces in different ways, as garrison troops, to silence opposition and quell internal disorder, and to advance various national objectives, at home and in other countries. Under petitioner's "combat" formula, large portions of the military establishments of countries like Soviet Russia, Communist China, or Cuba would not be regarded as part of their armed forces. This is absurd on its face and certainly not required by either the language or the purpose of Section 349(a)(3). Although other sections of the Immigration and Nationality Act dealing with military service sometimes have used qualifying language, *e.g.*, in requiring that service be "in active-duty status"[7] or "honorable"[8] or "in time of war"[9], no qualification of any kind appears in Section 349(a)(3). There is no basis for inserting restrictions which were not made by Congress.

A related contention is that the Rebel Army was not part of Cuba's armed forces because it was assigned certain "civic" responsibilities concerned generally with national reconstruction and rehabilitation. The answer again is that the statute does not depend for its operation upon the manner in which a nation uses its military personnel. The only question is whether the individual concerned was a part of the armed forces. The record shows that the Rebel Army was and remained the armed force of Cuba;

[7] Secs. 101(d)(1) and 329, 8 U.S.C. 1101(d)(1) and 1440.
[8] Secs. 328 and 329, 8 U.S.C. 1439 and 1440.
[9] Secs. 212(a)(22) and 314, 8 U.S.C. 1182 and 1425.

that the civic responsibilities were assigned because the national leaders deemed it appropriate that they be performed by the military; that a large part of the Rebel Army remained in its quarters and was not involved in these civic tasks (see R. 291a); that the entire Rebel Army retained its status as such—with uniforms, rank, pay, arms, and chain of command; that some of the civic duties were assigned to the less desirable members of the military forces; and that petitioner himself was for the most part involved in strictly military duties, such as military security, the execution of those condemned by military courts, and the training (*e.g.*, R. 193a, 141b) and command of troops.

We note in this connection that the United States military forces often have been engaged in what petitioner regards as "nonmilitary" pursuits. Thus the Corps of Engineers, a branch of the United States Army (10 U.S.C. 3038, 3063), does "civic" work in controlling rivers and beaches, and supervising the construction of bridges and dams. 33 U.S.C. 426–426h, 525, 541, 16 U.S.C. 460d, and 665a. The Army and Navy have governed many of our insular possessions in the past, and the Navy still governs some. *E.g.*, see annotations of 48 U.S.C. 1, 1421, 1431 and Geographic Report No. 4, dated February 7, 1963, entitled "United States and Outlying Areas," issued by the Geographer, Department of State. And our military forces were deeply involved in the government of Germany and Japan after our victory in World War II. Indeed some of the functions they performed then, including the trial and punishment of war

criminals and the policing and rehabilitation of the conquered nations, closely parallelled those of the Rebel Army after its victory in Cuba. See *In re Yamashita*, 327 U.S. 1; *Madsen* v. *Kinsella*, 343 U.S. 341.

Petitioner also suggests that the Cuban Regular Army, rather than the Rebel Army, fits the description "armed forces." As we have shown, the former group, to the extent that it was permitted to exist for a few months after January 1, 1959, was subordinate to the Rebel Army. In similar vein, petitioner refers to the Cuban militia. Although there is little in the record concerning this group (see R. 226a–227a), its status patently cannot detract from the conclusion that the Rebel Army was a dominant component of the armed forces of Cuban during the critical period.

3. Finally, we point out that on a number of occasions petitioner has acknowledged that he served in the military forces of Cuba after January 1, 1959. Thus, he is described as a Captain in Fidel Castro's revolutionary army in the February 23, 1960 article in the *Havana Times* written by his friend Jean Secon,[10] based on an interview with him and repre-

[10] Jean Secon is shown throughout the record as closely identified with petitioner. She wrote the *Havana Times* interview under her name (R. 282a), and the *Cavalier* magazine article under petitioner's name (R. 179–180a, 133b, 319b). She and petitioner were close friends in Cuba (R. 227b–228b) and they escaped from Cuba together (R. 132a–133a, 70b). She apparently was present in petitioner's apartment when immigration officers came to question him in 1961 and advised him at his interrogation at immigration headquarters (R. 60a, 71a, 76a, 136a, 3b, 6b, 31b). She was present at much of his deportation hearing, although petitioner did not call her as a witness.

sented by him to be true (R. 282a, 127a–130a, 66b–68b). He is described as a military officer in command of 7000 troops in his 1961 statement to immigration officers [11] (R. 304). He is described as a military officer in charge of executing war criminals, and as subsequently performing various military functions, in a magazine article titled "I Was Castro's Killer", which appeared under his name, although written by Jean Secon, in *Cavalier Magazine* in December 1960, after his arrival in this country. He vouched for the truth of the statements in this article (R. 308b, 182a–183a, 133b). He is shown in the Rebel Army uniform and insignia in two photographs in the record (R. 280a, 328b). He told one witness that he was "in the tactical forces * * * [o]f the Rebel Army" (R. 227b). And in the hearing he admitted being an officer in the Rebel Army after January 1, 1959, during a period when it was the dominant military force of Cuba (R. 160a–163a). Thus, the evidence (including petitioner's own accounts) compels the conclusion that the Rebel Army was part of Cuba's "armed forces," both *de facto* and *de jure*, after January 1, 1959.

[11] In the deportation hearing petitioner raised some questions concerning the circumstances under which this statement was taken (R. 81a). The facts it recites are established by overwhelming independent evidence and neither the special inquiry officer nor the district court found it necessary to rely on the statement (R. 363b, 203 F. Supp. at 392). Petitioner has not raised any question concerning this statement in this Court. We refer to it here and elsewhere only as a demonstration of a cumulative pattern.

C. PETITIONER'S SERVICE WAS VOLUNTARY

Petitioner urges that, even if he did serve in Cuba's armed forces, his service was not voluntary. We agree, of course, that voluntariness is an essential ingredient of expatriation. As to the burden of proof on this issue, the Chief Justice observed in *Nishikawa* v. *Dulles*, 356 U.S. 129, that "the citizenship claimant is subject to the rule dictated by common experience that one ordinarily acts voluntarily". However, "whenever the issue of voluntariness is put in issue, the Government must in each case prove voluntary conduct by clear, convincing and unequivocal evidence", 356 U.S. at 136, 138. At the same time, these observations must be read in context. Nishikawa was conscripted in a totalitarian country to whose conscription law, with its penal sanctions, he was subject; and this alone put in issue his voluntariness. See 356 U.S. at 153. There is no showing that Cuba had any conscription law at the time of petitioner's service and, even if it had such a law, there is no intimation that petitioner, an American citizen who did not have Cuban nationality, would have been subject to such conscription. We believe petitioner's self-serving assertions have not demonstrated any compulsion and that he has not actually put voluntariness in issue. However, even on the contrary assumption, we submit that the burden of proof imposed by *Nishikawa* has been met and that the record conclusively shows that petitioner's service in the armed forces of Cuba was voluntary.

Petitioner's claim of involuntariness rests on his own unsupported testimony that he returned to Cuba for a reunion with his comrades in the Rebel forces

after they had triumphed; that Che Guevara ordered him to take the post as officer in charge of security at La Cabana; and that he did not refuse "[b]ecause that's plain suicide by refusing an order from Che Guevara" (R. 150a–153a, 88b–92b).

This account was given for the first time at the deportation hearing. It is uncorroborated and in conflict with the facts developed in the record. The district court found it "incredible". 203 F. Supp. at 393.

There is not even a whisper of coercion in the written prehearing documents attributable to petitioner. First, there is the *Havana Times* article of February 23, 1960 written by petitioner's friend, Jean Secon, and certified by him as an accurate account of his statements. It declares that, following the fall of Batista, Marks became a captain of the guard at La Cabana fortress and it describes his sympathy with the Rebel aims (R. 282a). Since this article was written while petitioner was still in Cuba, it may be argued that he would not wish to suggest reluctance. This is not true, however, of the December, 1960 article in *Cavalier Magazine* ("I Was Castro's Killer"), which appeared under petitioner's signature and was written after his return to the United States (R. 308b). Not only is there no hint of any coercion in this article, but it tells how he returned to Cuba, "rejoining my unit in Havana on the third of January". It goes on to say, "On my return to active duty, Che made me security officer of Cabana". It spoke of his heavy responsibilities as security officer, including the execution of 79 "war criminals", justifying

these killings on the basis of "murders and atrocities committed by some of the condemned" and "the knowledge that these executions were not only justified but necessary." Finally, there is petitioner's statement to immigration officers on January 25, 1961, before the deportation proceedings were commenced (R. 304b–307b). Again there is no mention of coercion, and petitioner says he was "Second in Command of Cabana Fortress and was Chief Security Officer of the Regiment * * * I returned to combat duty on January 3rd or 4th, 1959."

Petitioner's own testimony at the hearing also undermines his present claim of duress. When Castro prevailed, petitioner was in the United States. No one compelled him to return to Cuba. He went of his own free will. In Cuba he immediately located his former command, installed in La Cabana fortress. From there he went to his former commander, Che Guevara, at the Presidential Palace, where he was enthusiastically received. All of those events indicate that petitioner was ready to participate further in the activities of his former cohorts—a conclusion further confirmed by his testimony that in returning to Cuba he hoped to obtain a land grant as a member of the Rebel Army, from which he "could have secure and permanent income" (R. 134b–135b).

The circumstances of petitioner's service in the Rebel Army after January 1, 1959, are also incompatible with the claim of duress. We have already noted the warmth of his welcome and his immediate assignment to a high security position, in charge of the execution of "war criminals". Such a display of

confidence hardly would be offered to an unwilling or "impressed" (to use petitioner's term) outsider. Another indicium is his assignment to other security responsibilities, including a return to Havana in 1960 where he admittedly held a position of trust and responsibility at El Principe (see R. 283a). Finally, involuntariness is negated by the enthusiasm with which petitioner performed his duties as Castro's executioner. This is reflected in the *Cavalier Magazine* article, in which petitioner justifies the executions. It is portrayed more vividly in the testimony of the witness Algaze, who, as Public Defender, was charged with the defense of those tried as war criminals (R. 174b). He saw petitioner at La Cabana every day for a period of months, dressed in the uniform and insignia of a Captain of the Rebel Army (R. 177b–178b). Petitioner gave the orders to the firing squads and would finish off the prisoners after the firing squads were through (R. 186b–187b). Petitioner mocked and terrorized the prisoners, who called him "the Death-Bird" (R. 197b). Petitioner would wait outside the tribunal for announcement of the death sentence, then "he would die of laughing", and would immediately take the prisoner off to be executed (R. 188b). On one occasion the firing squad refused to execute a Major Capote. Petitioner picked up a machine gun and himself killed Capote and seven other former members of the Regular Army, placing the firing squad under arrest (R. 193b–194b).[12]

[12] Some of the testimony of this witness—*e.g.*, petitioner's personal execution of prisoners—is corroborated in petitioner's article (R. 309b, 311b). The testimony concerning mistreat-

Other indicia of voluntariness are found in petitioner's failure to object to his military service. Petitioner claims that protests would have been futile and that he feared they would subject him to punishment. Yet he acknowledged that other Americans left the Rebel Army and that he knew of no instances where Americans were prevented (R. 190a, 138b).[13] In the light of the cordial relationship between him and the Rebel leaders, it is inconceivable that he could not have informed them that he had come back only to pay a visit and that, since the Revolution had succeeded, he was no longer interested in military service and planned to return to his home in the United States. His failure to make such a representation and the enthusiasm with which he thereafter performed his duties tell us eloquently that his military service after January 1, 1959 resulted from voluntary choice.

According to petitioner he once sought a discharge early in 1959 "because of the conditions which prevailed" (not because he was opposed to service), but this was refused by Che Guevara (R. 191a–192a). Even if this statement were credited, it indicates that petitioner had no fear of communicating his wishes to Che Guevara and that he would have had no difficulty in objecting to the military service at its outset. The only satisfactory explanation of his conduct is that he welcomed his new assignment.

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ment of prisoners is confirmed to some extent by a former Cuban judge, named Alabau, who investigated complaints against petitioner (R. 204b).

[13] The *Havana Times* article of February 23, 1960, referred to petitioner as "one of the few remaining Yanks serving in the Cuban Revolutionary forces" (R. 282a).

It is also significant that petitioner continued to serve in the Rebel Army for almost a year and a half. During this time, except for the single alleged conversation with Che Guevara, he made no effort to terminate his military service. Petitioner was frequently in communication with the American Consul, Mr. Kessler, but he never solicited the aid of the American Embassy, never sought asylum in the Embassy, never indicated to Mr. Kessler or the Embassy that his service in the Rebel Army was involuntary, and never voiced any objection to or dissatisfaction with his military service (R. 161a, 103b, 114b–116b, 120b).[14] In February 1960, petitioner was served by a representative of the American Embassy with a Certificate of Loss of Nationality (R. 166a, 255a, 297b). Although he then stated he would oppose his loss of citizenship, he never made any formal objection to the administrative action and never contended, through any contemporaneous written or oral expression, that his service in the Rebel Army was compelled (R. 167a–168a, 120b).

If petitioner was unhappy with his service in the Rebel Army, it would have been a relatively easy matter for him to have left Cuba, particularly in the early months. Travel between Cuba and the United

[14] Mr. Kessler's testimony was received by stipulation in the district court (R. 33a). It is not reproduced in the printed transcripts but appears in Exhibibt 1, p. 145–146, of the original record lodged with this Court. In it, Mr. Kessler confirms that he saw petitioner frequently in Cuba and that at no time did petitioner request assistance or asylum from the United States Government, or state to Mr. Kessler that he had been forced to enter into or serve in the Cuban Rebel Army.

States was relatively free, and a Cuban named Roger Redondo Gonzalez, who had been a Major in the Rebel Army, testified that he had been to Miami in January or February, 1959 and had gone to Tampa early in January, 1960 to pick up toys for his children (R. 230–231b). Petitioner has testified that he enjoyed freedom of movement while stationed in Havana in 1959 and 1960 (R. 121b–122b; see also R. 226b–228b), and that he was able to visit Havana on a number of occasions while he was stationed in the provinces (R. 126b–127b). In this year and a half petitioner made no effort to leave Cuba, until he made his successful escape, achieved with relative ease on the first attempt, in May 1960 (R. 186a). And we note that, when he finally decided to escape, his professed motivation was that he was in disfavor and facing arrest and not that he wished to be free of coerced military service (R. 132a).

Petitioner's claim that he was in jeopardy because of open anti-Communist activity on his part (R. 123a–125a, 313b–314b) is not corroborated by the record. His transfer from La Cabana occurred when the executions of Castro's early months had lessened. It was followed by transfer to other areas where his services were used. Moreover, petitioner's account conflicts with the known facts—his service for a year and a half without molestation, at a time when other dissidents were being arrested (R. 131a, 292b–294b); his admitted freedom of movement; and his continued assignment to responsible posts, including one at El Principe in Havana in 1960 (R. 125a, 283a). In any event, his alleged disillusionment and professed anti-

Communism after he voluntarily commenced to serve in the Cuban armed forces are not relevant. The issue is whether he undertook that service voluntarily.

For the same reason, the cases cited by petitioner (Pet. Br. 44–45), relating to involuntary continuation of service, are inapt. They relate to military service commenced when it did not cause expatriation, and continued thereafter because the person was unable to get out. We fully agree that such continued service would be involuntary.[15] But those cases have no possible application to military service which was voluntarily commenced at a time when it would result in expatriation.

II

PETITIONER'S VOLUNTARY SERVICE IN THE ARMED FORCES OF CUBA RESULTED IN HIS EXPATRIATION UNDER THE TERMS OF SECTION 349(A)(3) OF THE IMMIGRATION AND NATIONALITY ACT.

As argued above, petitioner served in the armed forces of a foreign state after January 1, 1959. Such service admittedly was not authorized in writing by the Secretary of State and the Secretary of Defense (R. 1b). Consequently petitioner was expatriated under the terms of Section 349(a)(3) of the Immigration and Nationality Act.[16]

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[15] Section 349(a)(3) takes into account such a situation in specifying that military service commenced when under 18 will result in expatriation only if there was opportunity to obtain release from such service after 18th birthday.

[16] The statute prescribes for loss of United States nationality by "entering, or serving in, the armed forces of a foreign state". We are relying here solely on petitioner's "service", which is amply established and is itself sufficient to cause expatriation. This also was the approach adopted by the special

Petitioner suggests that, in order to avoid constitutional questions, the Court should construe Section 349(a)(3) as being inoperative in the absence of an affirmative intention to renounce American nationality. We suggest that such a construction would avoid constitutional questions only by emasculating the statute and ignoring the obvious thrust of its language, structure and purpose. It would in effect read Section 349(a)(3) out of the law, since it would make that provision depend on the unlikely contingency that the person affected would concede that he had desired the loss of his American citizenship. And it would likewise nullify, for virtually all practical purposes, the statutory edicts relating to loss of citizenship by voting ((a)(5)), naturalization ((a)(1)), oath of allegiance ((a)(2)), employment by a foreign state ((a)(4)), and residence in a foreign state (Section 352).

When Congress wished to make relevant the motive to forsake citizenship, it had no difficulty in expressing itself, as it did in Section 349(a) (6) and (7), which authorize the formal renunciation of United States citizenship. The omission of any similar directive in 349(a)(3) clearly shows that Congress did not wish to prescribe it. Indeed, the construction urged by petitioner would make subsection (a)(3) largely superfluous, since formal renunciation could be accomplished under subsection (a)(6).

The plain meaning of the statute is confirmed by its legislative history. Provision for loss of nationality

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inquiry officer, the Board of Immigration Appeals, the district court, and the court of appeals.

through foreign military service was enacted for the first time in 1940. Theretofore, foreign military service did not expatriate, unless it was coupled with an oath of foreign allegiance. 39 Op. A.G. 337; *United States ex rel. De Cicco* v. *Longo,* 46 F. Supp. 170, 174 (D.C. Conn.). It was proposed, however, by the Cabinet Committee which drafted the Nationality Act of 1940 (*Codification of Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st. Sess., Part 1, p. 66–67) that nationality be lost by

> Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States * * *.

The resemblance of this proposal to the statute in its present form is apparent. In presenting its proposal the Cabinet Committee commented:

> This provision is based upon the theory that an American national who, after reaching the age of majority * * * voluntarily enters, or continues to serve in, the army of a foreign state, thus offering his all in support of such state, should be deemed to have transferred his allegiance to it. * * *

This proposal was adopted, without comment or change, by the House Committee in reporting the proposed Nationality Code. H. Rep. 2396, 76th Cong., 3d Sess., p. 82. The Senate Committee revised it by adding a clause restricting it to dual nationals. Its version stated that one serving in a foreign army would lose his United States citizenship only "if he has or acquires the nationality of such foreign state". S. Rep. 2150, 76th Cong., 3d Sess. The Senate Committee explained (pp. 3–4):

> The loss of American nationality would result not only from obtaining naturalization in a foreign state, or by the taking of an oath of allegiance or making an affirmation or other formal declaration of allegiance to a foreign country, but also from entering or serving in foreign military forces if thereby nationality in such foreign country is obtained, accepting employment under a foreign government for which its nationals only are eligible, or voting in a foreign political election or plebiscite.

The provision in question was enacted in this form as Section 401(c) of the Nationality Act of 1940, 54 Stat. 1137, 1169.

In the comprehensive study which preceded the Immigration and Nationality Act of 1952, the Senate Judiciary Committee referred to the 1940 Act's provisions for expatriation through foreign military service, and pointed out that this "general rule of expatriation by entering foreign military service is modified by certain Executive Agreements made by the President with foreign countries which permit foreign service without expatriation". S. Rep. 1515, 81st Cong., 2d Sess., p. 749. The report then went on to state:

> The subcommittee feels that the provisions covering loss of nationality through service in the armed forces of a foreign country should be uniform and should not be dependent upon foreign law, and therefore is recommending changes in this subsection designed to effect such uniformity.

As we have noted, the statute's language was restored to a form similar to that in the original draft of the

1940 Act, eliminating the provisions restricting its operation to dual nationals. This proposal was approved in the final reports of the House and Senate Committees, which stated that the committees proposed to continue, with modifications, "the provisions of the Nationality Act of 1940 relating to acts which cause loss of nationality". S. Rep. 1137, p. 46, H. Rep. 1365, p. 83, 82d Cong., 2d Sess. The committees then stated (*ibid.*):

> The next act causing loss of nationality is entering or serving in the armed forces of a foreign state unless expressly authorized to do so by the laws of the United States. The bill requires, in lieu of general authorization, that a specific authorization in writing must be made by the Secretary of State and the Secretary of Defense before a national of the United States may enter or serve in the armed forces of a foreign state without losing his status as a national of the United States. * * *

The recommendations of the Committee were enacted as Section 349(a) (3).[17]

We cannot find in this legislative history the slightest support for a hypothesis that foreign military service was to expatriate only if there was an affirmative wish to shed American citizenship. That hypothesis is unmistakably rejected by all guides to legislative purpose, which tell us that Congress intended that the unsanctioned military service itself

[17] Between 1953 and 1962, loss of citizenship through foreign military service was incurred by 3,591 American citizens. 1962 Annual Report, Immigration and Naturalization Service, p. 101.

was to cause expatriation. Moreover, we have noted that in the 1952 Act Congress eliminated the previous requirement that loss was to occur only "if he has or acquires the nationality of such foreign state". In the light of this excision, we can perceive no sound basis for a supposition that Congress intended another, and unexpressed, restriction on loss of nationality through foreign military service. The irrelevance of subjective desire is also shown by the provision that citizenship status will be preserved only if the prior consent of the Secretary of State and Secretary of Defense is obtained.

Petitioner cites no cases which support his hypothesis.[18] None of the numerous decisions dealing with expatriation through foreign military service turned on the citizen's subjective intent. Moreover, petitioner's hypothesis is directly opposed to this Court's holdings in *Mackenzie* v. *Hare*, 239 U.S. 299, *Savorgnan* v. *United States*, 338 U.S. 491, and *Perez* v. *Brownell*, 356 U.S. 44. Mrs. Mackenzie wished to marry an alien; Mrs. Savorgnan wished to be naturalized in a foreign state in order to marry an alien; and Mr. Perez wished to vote in a foreign election. Each disclaimed any intention to renounce American citizenship, but in each instance this Court deemed their desires and preferences immaterial, and found that citizenship had been lost by the voluntary acts. As stated in *Savorgnan* (338 U.S. at 499–500):

[18] The cases he cites (Pet. Br. 33–34) are clearly inapplicable. One concerns whether a dual national elected Canadian citizenship. The other deals with conscripted service found to be involuntary.

> [T]he acts upon which the statutes expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. There is no suggestion in the statutory language that the effect of the specified overt acts, when voluntarily done, is conditioned upon the undisclosed intent of the person doing them.

Petitioner suggests (Pet. Br. 32–33) that the above cases can be distinguished because they relate to dual nationals,[19] and did not result in statelessness. There is no basis for any such distinction in the rationale of the prevailing opinions. To read this statute to exclude subjective intent for dual nationals and to require it for others would require a semantic feat, unwarranted by the language or history.

III

SECTION 349(a)(3) IS CONSTITUTIONAL

In a number of recent cases, the Government has submitted briefs exploring the power of Congress to fix grounds for expatriation and the limitations on that power. *E.g., Kennedy* v. *Mendoza-Martinez*, No. 19, October Term, 1961. We proceed here upon the premise that the power exists and undertake to show that the limitations have not been transgressed by the statute in question.

A. THE STATUTE DOES NOT IMPOSE PUNISHMENT

The main burden of petitioner's constitutional argument rests on the assertion that "Section 349(a)(3)

[19] Of course, only Perez was actually a dual national. Mrs. Mackenzie and Mrs. Savorgnan lost their American citizenship upon performance of the expatriating acts, acquiring foreign nationality at that point.

is penal in form, purpose, and application" (Pet. Br. 15). From this premise he argues that the punishment allegedly inflicted by the statute offends the Eighth Amendment's edict against cruel and unusual punishment and also the procedural safeguards of the Fifth and Sixth Amendments. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144. We dispute the premise.

1. In none of the legislative materials cited by petitioner is there even the faintest intimation of a punitive design. On the contrary, the history shows that Congress was concerned with the international complications which may result from military service by Americans in the armed forces of a foreign state, and that it regarded such conduct as inconsistent with the obligations of American citizenship. We have already cited a portion of the legislative background (pp. 38–41), and we revert to the matter *infra* (pp. 54–58). Here we merely refer to the legislative materials cited by petitioner (Pet. Br. 20–22).

One is the 1938 statement of the Cabinet Committee in transmitting the proposed Nationality Code to the President. It said that the new expatriation provisions were not "designed to be punitive" and

> are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States.

Codification of the Nationality Laws of the United States, House Committee Print, 76th Cong., 1st Sess., Part 1, p. VII. In commenting on the proposed expatriation provision relating to foreign military

service, the Cabinet Committee observed (*id.* at 68) that a citizen who served in the armed forces of a foreign state,

> thus offering his all in support of such state, should be deemed to have transferred his allegiance to it.

The same thought is expressed in the testimony of the State Department's Richard Flournoy, one of the chief architects of these provisions:

> it does not seem reasonable that a person should give himself up and risk his life for the good of a foreign state and remain a citizen of the United States.

Hearings on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., p. 131. There is no suggestion of a punitive aim in these utterances, in the other materials cited by petitioner, or in any other materials we have found.

We agree that the label of a law is not conclusive in determining its character, *Trop* v. *Dulles*, 356 U.S. 86, 94, but it remains true "that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." *Flemming* v. *Nestor*, 363 U.S. 603, 617. Here, far from being able to show that "the evident purpose of the legislature" (*Trop* v. *Dulles*, 356 U.S. at 96) was to impose punishment, petitioner is reduced to bare assertion.

Petitioner's reliance on the majority opinion in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, and the Chief Justice's plurality opinion in *Trop* v. *Dulles*, *supra*, is misplaced. *Mendoza-Martinez* involved evasion of selective service obligations under a statute which "does not reach any conduct not otherwise

made criminal by the selective service laws."[20] More importantly, the relevant history persuaded the majority "that Congress in these sections decreed an additional punishment for the crime of draft avoidance."[21] This conclusion was reached only after analysis of an extensive background, going back many years. There are no comparable indicia of a penalty here.

The plurality opinion in *Trop* v. *Dulles* likewise found, on the basis of the statute itself and its history, that: "Here the purpose is punishment, and therefore the statute is a penal law. * * * There is no other legitimate purpose that the statute could serve." 356 U.S. at 97. The expatriation provision for desertion was activated only by conviction by a court martial, and the plurality opinion found that expatriation was superimposed as an additional penalty. Again there is no such showing here.[22]

Unlike *Mendoza-Martinez* and *Trop* the expatriation mandate here does not parallel or supplement the punishment for an offense under the criminal laws. While the absence of a concomitant criminal penalty is not dispositive, it is significant in assaying the purpose of the statute. See *Kennedy* v. *Mendoza-Martinez, supra,* 372 U.S. at 167, note 21, 168, 170 (note 30), 191 (note 5) (concurring opinion). Elsewhere, Congress has enumerated many criminal of-

[20] 372 U.S. at 191, note 5 (concurring opinion).

[21] 372 U.S. at 184.

[22] Section 349(a)(3) obviously does not become penal legislation because the deportation laws authorize temporary confinement pending a determination of deportability. See *Wong Wing* v. *United States*, 163 U.S. 228, 235, *Carlson* v. *Landon*, 342 U.S. 524, and discussion *infra*, pp. 75–76.

fenses involving infringement of foreign policies and programs of the United States (*e.g.*, 18 U.S.C. 951–968), but the conduct described in Section 349(a)(3) has never been designated a penal offense.[23]

2. Lacking any firm support in the legislative design or history, petitioner leans heavily on his plea that expatriation leaves him stateless (although it may not affect others in that way) and that he therefore is subjected to cruel and unusual punishment. But again petitioner misapprehends the plurality opinion in *Trop* v. *Dulles*, *supra*. The Chief Justice first found that the statute there under consideration imposed punishment, and he then concluded that this punishment, resulting in statelessness, was cruel and unusual. 356 U.S. at 99. Since Section 349(a)(3) is not a penal statute, there is no punishment whatever.

Petitioner's supposition that statelessness is necessarily to be equated with punishment does not seem reasonable when it is realized that a person who voluntarily renounces United States nationality under Section 349(a) (6) or (7) may thereby render himself stateless. Similarly a person who loses his nationality by oath of allegiance under Section 349(a)(2) may not acquire the nationality of another state. Nor does it

[23] Cf. 18 U.S.C. 959, which punishes enlistment *in the United States* in the service of a foreign government. There is no evidence that petitioner has violated this statute, and the legislative materials do not suggest, in any event, that Section 349(a)(3) was intended to complement 18 U.S.C. 959. Indeed, it appears the latter statute does not reach those who, like petitioner, enlisted abroad (Pet. Br. 29), while 349(a)(3) appears to be concerned primarily with those enlisted abroad.

appear that petitioner's position would be more favorable if he had taken advantage of the special privileges accorded veterans of the Rebel Army and had become a naturalized citizen of Cuba.[24] Whether he lost his American citizenship through military service or naturalization he would now be a refugee from Cuba, and unable to return to that country.[25]

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[24] Although there is no evidence in the record that petitioner became a naturalized citizen of Cuba, it appears that the Castro Government extended liberal naturalization benefits to alien members of the Rebel Army. R. 263a-267a. The severance of diplomatic relations with Cuba has precluded any check on petitioner's testimony that he did not take an oath of allegiance or obtain naturalization in Cuba.

[25] Petitioner hardly will be set adrift on an uncharted sea. He can be deported only to a country that will accept him. Section 243(a), Immigration and Nationality Act, 8 U.S.C. 1253(a); *United States ex rel. Tom Man* v. *Murff*, 264 F. 2d 926 (C.A. 2). And he cannot be sent to a country where he would be subject to physical persecution. Section 243(h), Immigration and Nationality Act, 8 U.S.C. 1253(h). As we shall show, the administrative proceedings thus far have considered only petitioner's deportability and not the place for his deportation (see p. 87, note 54). However, as matters now stand, it may transpire that no other country will accept him as a deportee, so that his situation as a stateless person in other countries may never arise. If this should occur, he would continue to remain in this country and ultimately might be able to regularize his status here by relief under Section 244 of the Immigration and Nationality Act, 8 U.S.C. 1254, or under some other legislation.

If petitioner left the United States and sought to return as an immigrant, he would be entitled to nonquota status, since he was born in the United States and last resided in Cuba. Secs. 202(a)(3), 101(a)(27)(C), Immigration and Nationality Act, 8 U.S.C. 1152(a)(3), 1101(a)(27)(C). However, if he seeks to reenter after deportation, he would need discretionary permission to reapply for entry. Section 212(a)(17), Immigration and Nationality Act, 8 U.S.C. 1182(a)(17). And he apparently would be inadmissible for prior conviction of a crime

Statelessness, we agree, is a severe consequence and results in an undesirable ambiguity of status. The status develops under the laws of many countries,[26] and the conditions that create it can sometimes be alleviated by legislative action.[27] But the severity of the consequence does not demonstrate the statute's unconstitutionality when there is no punitive intent. Cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 169, with *Flemming* v. *Nestor*, 363 U.S. 603, 616.

The problems of statelessness belong in the realm of policy and not of power. Under our laws, citizens and aliens are subjected to many far-reaching, and sometimes onerous, consequences which are not "punishment" in the constitutional sense: the expulsion of aliens,[28] denaturalization,[29] liability to selective military service,[30] high taxes,[31] restrictions on travel

involving moral turpitude (see p. 81), unless he procured a discretionary waiver of such inadmissibility under Section 212 (c) or (g) of the Immigration and Nationality Act, 8 U.S.C. 1182 (c) or (h).

[26] As we point out at p. 60, n. 39, *infra*, the laws of a number of countries prescribe loss of nationality as a consequence of foreign military service by their nationals.

[27] See authorities collected in *Perez* v. *Brownell*, 356 U.S. 44, 64 (dissenting opinion); *Trop* v. *Dulles*, 356 U.S. 86, 102 (plurality opinion); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 161.

[28] *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730; *Mahler* v. *Eby*, 264 U.S. 32, 39; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594–595; *Galvan* v. *Press*, 347 U.S. 522, 530–531.

[29] *Johannessen* v. *United States*, 225 U.S. 227; *Luria* v. *United States*, 231 U.S. 9.

[30] *Selective Draft Law Cases*, 245 U.S. 366, 378.

[31] *Helvering* v. *Mitchell*, 303 U.S. 391, 397–401.

abroad,[32] restraints on the use and enjoyment of property,[33] civil disabilities resulting from misconduct,[34] etc. None of these exacting liabilities or obligations is punishment, in the constitutional sense, in the absence of an explicit penal design. Their constitutionality depends upon whether they are reasonably adapted to a permissible legislative objective. The issue is one of substantive due process.

B. THE STATUTE IS A REASONABLE EXERCISE OF CONGRESSIONAL POWER

1. Section 349(a)(3) stems from the power to deal with foreign affairs and the powers inherent in national sovereignty. In our view, either of these branches of legislative authority is sufficient to support the statute.

Perez v. *Brownell*, 356 U.S. 44, upheld a statutory provision for expatriation through voting in a foreign political election. In doing so, it found "a rational nexus" (356 U.S. at 58) between the expatriation edict and the foreign affairs power. The nub of the court's

[32] *Kent* v. *Dulles*, 357 U.S. 116; *Worthy* v. *Herter*, 270 F. 2d 905 (C.A.D.C.), certiorari denied, 361 U.S. 918; *Frank* v. *Herter*, 269 F. 2d 245 (C.A.D.C.), certiorari denied, 361 U.S. 918; *Porter* v. *Herter*, 278 F. 2d 280 (C.A.D.C.), certiorari denied, 364 U.S. 837.

[33] *E.g.*, Zoning and anti-discrimination statutes. See also *Rex Trailer Co., Inc.* v. *United States*, 350 U.S. 148 (liquidated damages for fraud on government); *U.S. ex rel. Marcus* v. *Hess*, 317 U.S. 537 (same).

[34] See *Sacher* v. *Association of the Bar*, 347 U.S. 388 (disbarment); *Hawker* v. *New York*, 170 U.S. 189 (refusal of license as doctor because of criminal conviction years before statute was passed); *Garner* v. *Board of Public Works*, 341 U.S. 716 (refusal of public employment for prior subversive activity); *De Veau* v. *Braisted*, 363 U.S. 144 (exclusion from union office of convicted felon).

holding appears in the following excerpt from Mr. Justice Frankfurter's majority opinion, 356 U.S. 60–61:

> The importance and extreme delicacy of the matters here sought to be regulated demand that Congress be permitted ample scope in selecting appropriate modes for accomplishing its purpose. The critical connection between this conduct and loss of citizenship is the fact that it is the possession of American citizenship by a person committing the act that makes the act potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. The termination of citizenship terminates the problem. Moreover, the fact is not without significance that Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship.

See also Mr. Justice Brennan's explanation of the *Perez* holding in his concurring opinion in *Trop* v. *Dulles*, 356 U.S. 86, 105–107.

The rationale in *Perez*, as expressed in the above quotation, has two facets: (1) this measure was needed to avoid embarrassments and embroilments in our relations with foreign governments; (2) it was not unreasonable for Congress to interpret voting in a foreign election as inconsistent with allegiance to the United States and as denoting allegiance to another country. We submit that both of those considerations

are present here and surely no less forcibly than in *Perez*.

The danger of embroilment and embarrassment from voting in a foreign election is real enough, but it is hardly equal to the risks engendered by service in a foreign army. Military service is a more positive and active identification with the foreign government than voting. Such armed participation by our citizens in the military affairs of other nations may infringe national policies of neutrality; it may defy national policies which support or oppose particular nations; it may lead us in directions and into controversies embarrassing, and even hazardous, to our government and its citizens. See *Talbot* v. *Jansen*, 3 Dall. 133, 155. As stated in *Perez*, 356 U.S. at 59:

> Experience amply attests that, in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of the citizens of one nation when in another country can easily cause serious embarrassments to the government of their own country as well as to their fellow citizens. We cannot deny to Congress the reasonable belief that these difficulties might well become acute, to the point of jeopardizing the successful conduct of international relations, when a citizen of one country chooses to participate in the political or governmental affairs of another country. The citizen may by his action unwittingly promote or encourage a course

> of conduct contrary to the interests of his own government; moreover, the people or government of the foreign country may regard his action to be the action of his government, or at least as a reflection if not an expression of its policy.

The second consideration stressed in *Perez*—impaired allegiance to this country—is equally manifest here. Military service in this country, as in other countries, is one of the most "imperative obligations of citizenship." *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 159; *Selective Draft Law Cases,* 245 U.S. 366, 378. A person who serves in the armed forces of a foreign state has evinced a support of that country's aims and an obedience to its authority which are ordinarily quite inconsistent with his continued allegiance to the United States. Thus such service not only is precisely the type of conduct that can be dealt with by Congress in the exercise of its foreign affairs power under the majority concept in *Perez;* it also appears to be within the formulation of the Chief Justice's dissenting opinion in that case, 356 U.S. at 68:

> citizenship may not only be voluntarily renounced through exercise of the right of expatriation but also by other actions in derogation of undivided allegiance to this country.

It seems clear, therefore, that this statute represents a reasonable effort to deal with the twin problems of potential embroilments and impaired

allegiance. See *The Expatriation Act of 1954*, 64 Yale L. J. 1164, 1174. Moreover, Congressional awareness of those problems does not depend on conjecture. It emerges with clarity from the legislative background.

2. Statutory definition of grounds for expatriation was inaugurated by the Act of March 2, 1907, 34 Stat. 1228, was codified and extended in Sections 401–409 of the Nationality Act of 1940, 54 Stat. 1168–1170, and was further codified in Sections 349–356 of the Immigration and Nationality Act of 1952, 66 Stat. 267–272, 8 U.S.C. 1481–1488. The general history of this legislative development was extensively reviewed in *Perez*, 356 U.S. at 48–58. Here, we shall stress only the portions of the legislative history which bear directly on the immediate problem.

Military service by American nationals who have volunteered or have been conscripted in foreign armies has been a matter of deep concern to our Nation, from its inception. See 3 Moore, *International Law Digest*, Secs. 434–440; 3 Hackworth, *Digest of International Law*, pp. 166–207; Borchard, *Diplomatic Protection of Citizens Aboard*, 766 *et seq.*, 543 *et seq.*, 814; Tsiang, *The Question of Expatriation in America Prior to 1907*, pp. 45–55, 78–84; *Talbot* v. *Jansen*, 3 Dall. 133, 155. Indeed, the impressment of American nationals was a principal cause of the War of 1812. Moore, *supra*, Sec. 434.

This history and experience unquestionably influenced Congress in enacting the provisions relative to expatriation in the 1907, 1940, and 1952 statutes. As shown in *Perez*, 356 U.S. at 50–51, the sponsors of the 1907 Act, whose views were substantially adopted by

Congress, emphasized their concern with actions of American citizens which caused "increasing embarrassment" in our foreign relations and which were inconsistent with continued allegiance to this country.

The background of the 1940 Act is even more revealing. As we have noted (p. 44, *supra*), the Cabinet Committee observed that the proposed expatriation provisions

> are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States.

Codification of the Nationality Laws of the United States, 76th Cong., 1st Sess., Part 1, p. VII. The same committee also stated, in commenting on the proposed new provision for foreign military service (*id.*, at p. 67), that an American national who

> voluntarily enters, or continues to serve in, the army of a foreign state, thus offering his all in support of such state, should be deemed to have transferred his allegiance to it.

The point was elaborated by Richard W. Flournoy, one of those chiefly responsible for the new expatriation proposals:

> In very recent years Americans have entered the armies of foreign states. For instance, in the Spanish war and in the present war a good many are going into the armies of foreign states, and it does not seem reasonable that a person should give himself up and risk his life for the good of a foreign state and remain a citizen of the United States, although it may be

reasonable to provide for recovering the citizenship readily in such cases.

Hearings on H.R. 6127, superseded by H.R. 9980, 76th Cong., 1st Sess., p. 131. Mr. Flournoy's testimony referred to "the World War" and "the present war," which indicated, respectively, World War I and World War II. Before American involvement in those conflicts, many Americans had volunteered for service in the contending armies, primarily on the Allied side.[35] Mr. Flournoy's reference to "the Span-

[35] Section 323 of the Nationality Act of 1940, 54 Stat. 1149, codifying a 1918 enactment, afforded an expeditious process for resumption of American citizenship by persons who had lost such citizenship through military service, coupled with an oath of allegiance, in Allied Armies during World War I. Section 323 was amended by the Act of April 2, 1942, 56 Stat. 198, to extend its benefits to persons who had lost citizenship through service in Allied Armies in World War II. It was reenacted, with some modifications, in Section 327 of the Immigration and Nationality Act, 8 U.S.C. 1438. See *Reaume* v. *United States*, 124 F. Supp. 851 (E.D. Mich.); *Matter of P—*, 4 I & N Dec. 248. In addition, Section 101(a)(27)(D), 8 U.S.C. 1101 (a)(27)(D) grants nonquota status to such a person who seeks to return to the United States to regain his citizenship under Section 327. The World War II legislation appears to have been motivated by a desire to restore the citizenship of Americans who had joined allied armies, so that they could serve in the armed forces of the United States. See H. Rep. 1904, S. Rep. 1166, 77th Cong., 2d Sess.

Section 317(c) of the Nationality Act of 1940, 54 Stat. 1147, conferred similar naturalization and nonquota benefits upon any person who had lost his citizenship under Section 401(c), through service in foreign armed forces. See *Di Iorio* v. *Nicolls*, 182 F. 2d 836 (C.A. 1). However, this provision was not continued in the 1952 codification, and the reason for its elimination is not revealed in the legislative deliberations. At present, therefore, a person who lost citizenship through foreign military service, other than in allied armies during World War I or II, does not get any special naturalization or immigration

ish war" denoted the recently concluded Civil War in Spain, in which many Americans had participated. The plain implication of his remarks, in the light of the previous statutory history, was that these and other instances of service by American citizens in foreign armies was an actual or potential source of embarrassment to the foreign relations of the United States.

We have previously noted (pp. 39–41, *supra*) that the Cabinet Committee's proposal relating to expatriation through unsanctioned military service was modified by Congress in the 1940 Act by restricting it to dual nationals, and that the 1952 Act restored this provision substantially to the form proposed by the Cabinet Committee. This revision is explained in the following statement in the Senate Judiciary Committee study which preceded the 1952 Act, S. Rep. 1515, 81st Cong., 2d Sess., p. 749:

> The subcommittee feels that the provisions covering loss of nationality through service in the armed forces of a foreign country should be uniform and should not be dependent upon foreign law, and therefore is recommending changes in this subsection designed to effect such uniformity.

While the Committee did not refer directly to the motivation made explicit in the legislative history of

benefits. However, as we have noted (p. 48, *supra*), petitioner is entitled to nonquota status, and he eventually would be eligible to apply for naturalization if he succeeds in achieving lawful residence.

the 1940 and 1907 Acts,[36] the 1952 recodification must be read, of course, in the light of that history, particularly since it reverted substantially to the pattern proposed by the Cabinet Committee which drafted the 1940 Nationality Code. That the Committee viewed foreign military service and the conduct of foreign affairs as intimately related is underscored by the new statutory directive in Section 349(a)(3) that foreign military service would expatriate unless it was "specifically authorized in writing by the Secretary of State and the Secretary of Defense".[37]

3. The only remaining question is whether the means chosen to effectuate the Congressional policy are reasonable. In this respect, also, we believe the issue is directly resolved by *Perez* v. *Brownell*. The Court's opinion points out, 356 U.S. at 60, that the possession of American citizenship by the person who participates in the political affairs of a foreign nation is

[36] No further elaboration is found in the final Committee reports on the 1952 Act. S. Rep. 1137, p. 46, H. Rep. 1365, p. 83, 82d Cong., 2d Sess.

[37] During the legislative hearings the legislative committees considered and evidently rejected proposals to enhance the flexibility of this provision by providing alternatively for general authorization of military service by law, to permit approval either by the Secretary of State or the Secretary of Defense, to permit approval of such service to be given after it was undertaken, and to exempt service in the armed forces of nations which later became allied with this country. See Joint Hearings before the Subcommittees of the Committees on the Judiciary, 82d Cong., 1st Sess., on S. 716, H.R. 2379, and H.R. 2816, pp. 101, 85, 96. The expressions in these hearings, particularly at page 101 *supra*, indicated a keen awareness of the foreign policy implications of this measure.

> potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations. *The termination of citizenship terminates the problem.* [Emphasis added.]

In similar vein, Mr. Justice Brennan pointed out in his concurring opinion in *Trop* v. *Dulles*, 356 U.S. at 106–107:

> Congress might reasonably believe that in these circumstances there is no acceptable alternative to expatriation as a means of avoiding possible embarrassments to our relations with foreign nations. And where Congress has determined that considerations of the highest national importance indicate a course of action for which an adequate substitute might rationally appear lacking, I cannot say that this means lies beyond Congress's power to choose.

Patently, these considerations apply with at least equal force to the conduct involved here. The service by an American citizen in the armed forces of a foreign state provokes a situation "pregnant with the possibility of embroiling this country in disputes with other nations." Such conduct takes place on foreign soil and it is the American citizenship of the person committing the act which creates the potential danger. "The termination of citizenship terminates the problem." And Congress could reasonably conclude that there is "no acceptable alternative to expatriation" in such cases. That device is "a uniquely potent corrective" for actions which "could dangerously prejudice our diplomacy". *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 187 (Brennan, J., con-

curring).[38] Without it, the United States would lack effective means to cope with a citizen who participates in foreign military ventures inherently embarrassing to our nation and perilous to its people.[39]

Petitioner argues that Section 349(a)(3) "is not confined to 'embarrassing' service in the military of an enemy or unfriendly nation", but would also reach "nonembarrassing" service in the army of an ally. (Pet. Br. 24). But certainly Congress may adopt reasonable classifications or categories in dealing with a general problem. As stated in *Perez*, in implementing its power over foreign affairs, Congress must be free to legislate "on more than an *ad hoc* basis" (356 U.S. at 59–60).

It is possible, to be sure, that in some instances foreign military service by a citizen may not be embarrassing to the United States. But the individual citizen cannot be permitted to make this judgment.

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[38] The alternatives mentioned in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 184–185, obviously are not relevant here, since they were suggested in relation to the imposition of punishment on a draft evader. The court did not hold that expatriation could not be imposed as a nonpunitive, regulatory measure, implementing the foreign affairs power. And it did not question the conclusion announced in *Perez*, that expatriation was a rational device for dealing with the problem of a citizen who engages in political activity in a foreign country.

[39] Many other nations provide for loss of nationality by their nationals who serve in the armed forces of foreign states. These include Afghanistan, Argentina, Australia, Austria, Brazil, Cuba, Germany, Guatemala, Hungary, Indonesia, Iraq, Italy, Jordan, Panama, Portugal, and Turkey. See United Nations Legislative Series, St / Leg / Ser. B/4, *Laws Concerning Nationality*, pp. 3, 12, 19, 36, 56, 109, 183, 200, 222, 233, 243, 268, 275, 371, 392, 461. A number of these laws resemble Section 349(a)(3), *e.g.*, those of Austria, Cuba, Germany, Indonesia, Iraq, Italy, Jordan, and Turkey.

Indeed, the very examples petitioner gives (Pet. Br. 37) of military service by individual Americans to advance objectives they deem desirable illustrate quite graphically the hazards to our nation's foreign policy aroused by such unsanctioned participation. Nor is it advisable to allow the matter to be controlled by a foreign government, as the Senate Judiciary Committee's 1950 report indicates. Instead, the statute properly reposes the responsibility for assessing the interests of the United States in the foreign affairs agencies of our government, by prescribing expatriation "unless, prior to such entry or service, such entry or service is specifically authorized in writing by the Secretary of State and the Secretary of Defense".

We submit that the means chosen by Congress to achieve its purpose were constitutionally permissible and well within the broad range of discretion guaranteed the Legislative Branch.

IV

THERE WAS NO DENIAL OF PROCEDURAL DUE PROCESS

We have already considered petitioner's assertion that the statute visits punishment without procedural safeguards. At this point we shall discuss his other procedural objections.

A. EXPATRIATION OCCURRED WHEN THE MILITARY SERVICE WAS PERFORMED AND DID NOT DEPEND ON ANY ANTECEDENT JUDICIAL OR ADMINISTRATIVE DETERMINATION

1. Petitioner contends (Pet. Br. 70) that there can be no loss of citizenship until there has been a judicial determination of alienage. This view was

adopted by the district court but rejected by the court of appeals which held that loss of nationality occurred "immediately upon commission of the expatriating acts", and that this consequence was not constitutionally prohibited. We believe that the court of appeals was clearly correct.

The mandate of the statute that there be an automatic loss of citizenship upon performance of an expatriating act hardly could be more explicit. The introductory clause of Section 349(a) declares that a person who commits the specified acts "shall lose his nationality". The only mention in Section 349 of proceedings antecedent to such loss is in paragraphs (7)—requiring approval by the Attorney General for a renunciation of citizenship during war; (8)—making conviction by a court martial or court prerequisite to loss of citizenship by military deserters[10]; and (9)—making similar convictions prerequisite to loss of citizenship for treasonous acts. Denaturalization of a naturalized citizen is another instance in which the statute requires a judicial determination before loss of citizenship can occur. See Section 340, Immigration and Nationality Act, 8 U.S.C. 1451. The absence of such a prescription in Section 349(a)(3) indicates that none was intended. Moreover the legislative purpose is made even more explicit in Section 356 of the Immigration and Nationality Act, 8 U.S.C. 1488, which specifies that:

> The loss of nationality under this chapter shall result solely from the performance by

[10] This provision was found unconstitutional in *Trop* v. *Dulles*, 356 U.S. 86.

national of the acts or fulfillment of the conditions specified in this chapter.

The aim of this section to make loss of nationality automatic is underlined in the report of the Cabinet Committee on the 1940 Act. *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st Sess., Part 1, p. 78. Cumulative evidence is found in the provisions granting special immigration and naturalization benefits to certain classes of expatriates. See Secs. 101(a)(27)(D), 324 and 327, Immigration and Nationality Act, 8 U.S.C. 1101(a)(27)(D), 1435 and 1438 and note 35, *supra,* p. 56.

We note also the provision for a certificate of loss of nationality by State Department officials who believe a person in a foreign state "has lost his United States nationality". Section 358, Immigration and Nationality Act, 8 U.S.C. 1501; 22 CFR 50.14–50.19. Such a certificate was served on petitioner in Cuba. (R. 254a, 296b). It is evident, both from the language of this statute and its legislative history, that such certificates were designed only to recognize a previous occurrence. See *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st Sess., Part 1, pp. 80, 78, VI.

The language and structure of Section 349(a)(3) thus compel the conclusion that under its terms loss of citizenship occurs immediately when foreign military service is performed. This reading is abundantly confirmed in the legislative history. See *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st Sess., Part 1, pp. VII, 67, 78; S. Rep. 1515, 81st Cong., 2d Sess., pp.

747, 749; S. Rep. 1137, p. 46; H. Rep. 1365, p. 83, 82d Cong., 2d Sess.

2. Since the design of the statute is plain, petitioner's position must rest on an asserted lack of power. But this, too, is without substance. Since Section 349(a)(3) does not inflict punishment, petitioner can point to no specific constitutional command which requires a judicial declaration before the statute can operate. Cf. *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144.

Nor is there any question of due process. Every decision of this Court since the early days of the Republic has found or assumed that loss of citizenship was the immediate consequence of certain actions, and that the courts were called on to determine only whether that event had occurred. The earliest cases, decided long before there were any statutory definitions of expatriation, dealt with property rights. The courts determined in each instance that an "act of expatriation" had not occurred and that citizenship had not been lost. *Talbot* v. *Jansen*, 3 Dall. 133, 162–166, 169; *The Charming Betsy*, 2 Cranch 64, 120; *The Santissima Trinidad*, 7 Wheat. 283, 346–347, *Inglis* v. *Sailor's Snug Harbour*, 3 Peters 99; *Shanks* v. *Dupont*, 3 Peters 242, 246. The modern decisions commenced with *Mackenzie* v. *Hare*, 239 U.S. 299, which refused to disturb the finding of election officials that the act of marriage had caused expatriation. *Perkins* v. *Elg*, 307 U.S. 325, 329, 334 considered the Secretary of State's refusal of a passport, recognized that expatriation would have resulted spontaneously from voluntary action of the citizen, but

ruled that there had been no such voluntary action. Similar conclusions were expressed in *Mandoli* v. *Acheson*, 344 U.S. 133, 136 and *Kawakita* v. *United States*, 343 U.S. 717, 734. *Savorgnan* v. *United States*, 338 U.S. 491, 499, 500, 506 found that earlier overt acts had caused expatriation. This also was the finding in *Perez* v. *Brownell*, 356 U.S. 44, 60–61 which declared that the automatic operation of expatriation was its major value in implementing the foreign affairs function. The expressions of a majority of this court in *Trop* v. *Dulles*, 356 U.S. 86, 92, 106, 126 likewise acknowledged the automatic nature of expatriation. And this Court's latest holding in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 164 was premised squarely on a finding that the expatriation statutes "automatically—without prior court or administrative proceedings—impose forfeiture of citizenship". The majority concluded that the statute there under consideration entailed punishment, and held that such automatic loss of citizenship could not be imposed since the statute had not observed the procedural protections prescribed for a criminal trial. Since Section 349(a)(3) is not punitive, there are no such inhibitions here.

Thus the supposition that expatriation must await a judicial pronouncement is repudiated by every relevant decision of this Court. Citizenship, except through naturalization, is conferred automatically and it does not seem unreasonable for Congress to declare that loss of citizenship, when this consequence is appropriate, likewise shall result from certain overt actions. Moreover, we believe that the acceptance of petitioner's theory would go far to nullify the expatri-

ation statutes. In the first place, we are not aware of any judicial proceeding the United States could bring to establish that loss of nationality has occurred, particularly against a defendant who is outside the United States. Petitioner apparently supposes that expatriation should await the bringing of an action by the alleged citizen to determine his status. We doubt that many such actions would be brought. More important, petitioner's theory would prevent our government from adopting effective measures to deal with a citizen, including one who has renounced his American citizenship, who continues, in a foreign land, to engage in conduct perilous to our nation and repugnant to his obligations of citizenship. Since a judicial deprivation of citizenship would be impracticable or impossible, such a person would be able to retain the mantle of American citizenship while causing continuing embarrassments and dangers to the United States.

Our position does not, of course, shut off access to the courts, since a person claiming to be a citizen has many methods of establishing his title. If abroad, he can obtain a certificate of identity from the Secretary of State so that he can come to this country to press his claim. Section 360 (b) and (c), Immigration and Nationality Act, 8 U.S.C. 1503 (b) and (c). He can also bring suit in a court in this country for a judgment declaring him to be a citizen of the United States. Section 360(a), Immigration and Nationality Act, 8 U.S.C. 1503(a). Such a declaratory judgment suit could have been brought even while the petitioner was in Cuba. *Rusk* v. *Cort*, 369 U.S. 367. And in

challenging the deportation order petitioner was entitled to, and received, *de novo* judicial consideration of his citizenship status. *Ng Fung Ho* v. *White*, 259 U.S. 276. Moreover, in such judicial proceedings the burden was on the government to establish petitioner's loss of citizenship by clear, unequivocal, and convincing evidence. *Gonzales* v. *Landon*, 350 U.S. 920; *Nishikawa* v. *Dulles*, 356 U.S. 129. He would have been entitled to similar *de novo* judicial inquiry if he had sought declaratory review[41] of the deportation order, *Frank* v. *Rogers*, 253 F. 2d 889 (C.A.D.C.), or challenged it by petition for review by the court of appeals. Section 106(a) (5), Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a)(5).

These are formidable procedural protections. They assure to petitioner the full measure of judicial inquiry requisite to due process.[42]

B. THE ABSENCE OF A PRIOR JUDICIAL DETERMINATION DOES NOT INVALIDATE A DEPORTATION ORDER BASED UPON AN ADMINISTRATIVE DETERMINATION OF CITIZENSHIP WHICH WAS SUBJECT TO SUBSEQUENT DE NOVO REVIEW

In the course of the deportation hearing plaintiff claimed citizenship. The administrative authorities determined the issue. The district court subsequently made its own *de novo* determination upon review. Petitioner now argues that the deportation order

[41] This remedy has now been supplanted by the petition for review by the court of appeals. See *Foti* v. *INS*, 375 U.S. 217.

[42] In emphasizing its wish to make expatriation automatic the Cabinet Committee which drafted the 1940 Act pointed to the availability of such judicial review. *Codification of the Nationality Laws of the United States*, House Committee Print, 76th Cong., 1st Sess., Part. 1, p. 78.

should be set aside on the ground that the administrative authorities could not proceed with the deportation hearing until after his claim of citizenship had been judicially determined. There are two answers. First, the administrative authorities have jurisdiction to inquire into citizenship when drawn in issue in a deportation proceeding. Second, there was no prejudice in any event, because the petitioner's lack of United States citizenship has now been determined *de novo* by the courts.

We agree that the question whether petitioner lost his citizenship by voluntary service in the armed forces of Cuba is a fit subject for judicial determination. Petitioner could have raised the issue in various ways, including an application for a declaratory judgment. See *supra*, pp. 66–67. We also agree that no administrative ruling would bar an independent *de novo* judicial determination upon review. But those premises will not sustain the conclusion that the Attorney General has no authority to rule upon the issue when it is material to a proceeding within his jurisdiction. The power of the courts to make an independent adjudication when their jurisdiction is properly invoked does not exclude administrative action in this area.

The proposition that the Attorney General may determine issues of citizenship has long been settled. *United States* v. *Sing Tuck*, 194 U.S. 161. Alienage is a jurisdictional element in a deportation charge, and a deportation order cannot stand unless the government proves that the person charged is an alien. *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149,

153. But it does not follow that whenever a person urges a "plausible" claim to citizenship (Pet. Br., p. 41), the administrative proceeding must halt. On the contrary, it is necessary for the Attorney General to determine his jurisdiction—since he can deport only aliens—in order to conclude the proceeding and arrive at a decision. Sometimes, this entails passing on claims to United States citizenship, and not infrequently the administrative decision upholds that claim. See, *e.g.*, *Matter of Z—*, 9 I & N Dec. 329; *Matter of P—*, 9 I & N Dec. 362; *Matter of H—*, 9 I & N Dec. 411; *Matter of S—*, 8 I & N Dec. 226; *Matter of C.*, 8 I & N Dec. 511; *Matter of S—*, 8 I & N Dec. 340; *Matter of G—*, 4 I & N Dec. 57; *Matter of Z—*, 2 I & N Dec. 346.[43] The courts are not called upon to consider the many cases (of which the above are only a sampling) in which the administrative ruling is favorable. One claiming citizenship unquestionably has a right to a judicial determination but only when and if the administrative ruling goes against him. And the Attorney General's authority to rule on citizenship claims, and thus to make a preliminary appraisal of his jurisdiction, exists whether the issue relates to the acquisition of citizenship or its loss.

Petitioner's assumption that the Attorney General is not empowered to adjudicate citizenship status is decisively opposed by a host of authorities. The leading case is *United States* v. *Sing Tuck*, 194 U.S. 161. Rejecting a contention that immigration officers could not adjudicate the citizenship status of entry appli-

[43] The latter three decisions found citizenship had not been lost through alleged foreign military service.

cants who claimed to be native United States citizens, Mr. Justice Holmes stated, 194 U.S. at 167, 168, 170, that the statute:

> points out a mode of procedure which must be followed before there can be a resort to the courts. In order to act at all the executive officer must decide upon the question of citizenship. If his jurisdiction is subject to being upset, still it is necessary that he should proceed if he decides that it exists * * *. [I]t is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way * * *. [B]efore the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with.

The authority to adjudicate citizenship claims in passing on applications for admission to the United States was also sustained in *United States* v. *Ju Toy*, 198 U.S. 253, 262; *Chin Yow* v. *United States*, 208 U.S. 8, 12; and *Tang Tun* v. *Edsell*, 223 U.S. 673, 675. For more recent lower court expressions, see *United States ex rel. Lapides* v. *Watkins*, 165 F. 2d 1017, 1018 (C.A. 2); *Lee Fong Fook* v. *Wixon*, 170 F. 2d 245, 246 (C.A. 9), certiorari denied, 336 U.S. 914; *Pan American World Airways* v. *United States*, 122 F. Supp. 682, 685–686 (Ct. Cl.).[44]

[44] Petitioner's quotation from *United States* v. *Minker*, 350 U.S. 179, 188 (Pet. Br. 41) is taken out of context and misapplied. *Minker* involved only the validity of subpena against a naturalized citizen. Mr. Justice Frankfurter obviously did not deny the power of the Attorney General to rule on citizenship issues, subject to *de novo* inquiry in the courts when the citizenship claim was rejected.

Petitioner is mistaken in his belief that *Ng Fung Ho* v. *White*, 259 U.S. 276, precludes the consideration of his citizenship claim by immigration officers. *Ng Fung Ho* did qualify the holding of *Ju Toy, supra*, when it concluded that upon judicial review of a deportation order the court would conduct *de novo* scrutiny of a non-frivolous citizenship claim which had been presented in the administrative proceedings. But it did not disturb the *Sing Tuck* pronouncement that the executive officers must be permitted to rule on their jurisdiction and that "even fundamental questions must be decided in an orderly way". Indeed, Mr. Justice Brandeis cited *Sing Tuck* in declaring that "The proceeding is obviously not void *ab initio*". 259 U.S. at 282. And in remanding the case for *de novo* hearing on the citizenship issue the court refused to direct that the petitioners should be discharged from custody under the deportation order. 259 U.S. at 285.

Other deportation cases in which the courts have approved the consideration of citizenship claims in a deportation proceeding include *Chin Bak Kan* v. *United States*, 186 U.S. 193, 200; *Ah How* v. *United States*, 193 U.S. 65; *Florentine* v. *Landon*, 231 F. 2d 452 (C.A. 9); *Hernandez-Avila* v. *Boyd*, 294 F. 2d 373, 376 (C.A. 9); *In re Wing*, 124 F. Supp. 492, 494 (N.D. Cal.). Moreover, *Perez* v. *Brownell*, 365 U.S. 44, furnishes additional confirmation since the citizenship claim there was fully adjudicated in a deportation proceeding before the declaratory judgment suit was brought. No member of the Court questioned the authority to conduct the deportation proceeding to

its conclusion. Cf. dissenting opinion of the Chief Justice, 356 U.S. at 65, note 6. The Court's apparent assumption in *Perez* is in line with the cases holding that the declaratory judgment suit can be brought only after final administrative action. *Ling Share Yee* v. *Acheson*, 214 F. 2d 4 (C.A. 3); *Lew Hsiang* v. *Brownell*, 234 F. 2d 232 (C.A. 7); *Ferretti* v. *Dulles*, 246 F. 2d 544 (C.A. 2). Added corroboration is found in the new statute for judicial review of final deportation orders (see *Foti* v. *INS*, 375 U.S. 217), which recognizes a right to *de novo* judicial inquiry of citizenship claims in reviewing the final deportation order and supersedes the declaratory judgment remedy in such cases. Section 106(a)(5), Immigration and Nationality Act, as amended, 8 U.S.C. 1105a(a)(5).[35]

Petitioner's reliance (Pet. Br. 41) on *Kessler* v. *Strecker*, 307 U.S. 22, and *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, is misplaced. *Kessler* merely found that the lower court had erroneously ordered a *de novo* judicial hearing in reviewing a deportation order, since no citizenship issue was presented. It pointed out that the deportation proceeding was administrative and that a *de novo* judicial hearing in a habeas corpus review of the deportation order would have been warranted only on a citizenship claim when "an alleged alien asserts his United States citizenship in the hearing before the Depart-

[35] *Wong Wing Foo* v. *McGrath*, 196 F. 2d 120 (C.A. 9), cited by petitioner (Pet. Br. 41) merely held that in a suit for declaratory judgment of citizenship, the Court's consideration was *de novo*. This holding was indubitably correct. *Perez* v. *Brownell*, 356 U.S. 44, 47, note 2.

ment, and supports his claim by substantial evidence". *Sing Tuck* was cited in support of this statement. 307 U.S. at 34–35. *Bilokumsky* similarly did not involve a citizenship claim. The question was whether the government had sustained its burden of proving the alienage of a respondent who stood mute. The quotation recited by petitioner merely cited *Ng Fung Ho* in stating that if citizenship status had been supported by substantial evidence in the deportation proceedings it would thereafter have been "finally determined" by a judicial tribunal. Moreover, in a subsequent passage the Court recognized the authority of immigration officers to rule on citizenship claims in deportation proceedings, citing *Sing Tuck* and stating, 263 U.S. at 153: "It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact".

Consequently, we believe it firmly established that the Attorney General has authority to rule on the citizenship claim in determining whether he had jurisdiction to direct deportation, and that petitioner's undoubted right to a judicial review of the issues decided in that proceeding matured only when there was a final adverse ruling.

Finally, we cannot in any event see any point to petitioner's attack on the administrative proceeding at this time. Although we do not believe such a challenge has any substance, it would have relevance only while that proceeding was pending. The administrative determination has long since been made, and even if petitioner's position were correct it would entitle him only to a *de novo* judicial hearing, which

is exactly what he has received. Petitioner did question the administrative process at its outset but his challenge was rejected by the district court. 198 F. Supp. 40. He did not appeal the district court's rejection, but went through the administrative proceeding to its completion. Since he is now receiving the judicial consideration he asked for, the contention has, at most, an academic significance.

C. THE CONTENTIONS BASED ON ALLEGED IRREGULARITIES IN THE ARREST AND DETENTION ARE INSUBSTANTIAL.

Petitioner's account of the circumstances of his arrest is inaccurate. The record shows that he was interrogated by immigration officers at his home on the evening of January 25, 1961 and voluntarily went to the immigration office where the interrogation was continued for several hours (R. 59a *et seq.*, 236a, 241a, 9b *et seq.*). Throughout the interrogation he was accompanied by his friend, Jean Secon, who advised him not to talk without a lawyer. (R. 3b–6b, 22b). He did not accept her advice and continued to answer questions, saying he did not need an attorney (R. 31b). It is clear that Marks was not under arrest during this questioning and was placed under arrest only on the morning of January 26, 1961, after he had completed his statement (R. 28b–29b, 37b). This arrest was made without warrant, under the authority of Section 287(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1357(a)(2), on the ground that petitioner appeared to be a deportable alien who was likely to escape before a warrant could be obtained. An order to show cause in deportation

proceedings was issued and served the same day, shortly after the arrest. That same day, he also was served with a warrant of arrest in the deportation proceedings and his detention was ordered pending determination of his deportability (R. 67a). The authority for such arrest and detention pending determination of deportability is found in Section 242(a) of the Immigration and Nationality Act, 8 U.S.C. 1252(a). The basis for the arrest and detention was a determination, based on solid evidence, that if released he would be likely to abscond. (R. 23a–24a, 29a).

Petitioner contends that his arrest and detention could be authorized only by a judicial officer, even though the proceeding is entirely administrative. This contention is not supported by any authority, and indeed conflicts with uniform legislative policy and administrative practice and with the consistent holdings of this Court for 75 years. We do not agree that the constitutionality of administrative arrests in deportation proceedings was left open in *Abel* v. *United States*, 362 U.S. 217. *Abel* was a criminal prosecution in which a prime issue was whether evidence had lawfully been obtained in a search incidental to an immigration arrest. There could have been no proper search if the arrest was unlawful. While the Court noted that this issue had not been raised in the lower court, we hardly think such an omission would have persuaded the Court to countenance a denial of fundamental rights. See *Rosenberg* v. *Fleuti*, 374 U.S. 449. In fact, Mr. Justice Frankfurter's prevailing opinion in *Abel* carefully exam-

ined the arresting authority of immigration officers, pointed out that it had been sanctioned by statute since the earliest days of the Republic and had been accepted without question by numerous decisions of this Court, and found no basis for invalidating the arrest and concomitant search in "the presence of this impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation". 362 U.S. at 230–234. The recent case of *United States* v. *Martinez Alvarado*, 321 F. 2d 363 (C.A. 2), followed *abel* in upholding a search after an immigration arrest without warrant. Other holdings which have directly endorsed the administrative power to arrest and detain persons against whom deportation proceedings are brought include *Wong Wing* v. *United States*, 163 U.S. 228, 235, and *Carlson* v. *Landon*, 342 U.S. 524.

Petitioner complains that there is no specific requirement for probable cause in the statute or regulations. But such a specification is unnecessary since an arrest without probable cause would be arbitrary and could be challenged immediately by habeas corpus. See *Carlson* v. *Landon*, *supra*. Petitioner did launch a challenge and the district court ruled against him. 198 F. Supp. 40, 45. We believe the district court was right, since there clearly was probable cause for believing him an alien subject to deportation. Petitioner could have appealed the ruling, but he did not choose to do so.

Petitioner next argues that the administrative authorities were powerless to arrest and detain him because he claimed to be a citizen of the United

States. This is but a variation of the same theme. While the statute speaks of arresting and detaining "aliens", this language necessarily must include persons believed with probable cause to be aliens. Otherwise the jurisdiction to conduct immigration proceedings could be ousted simply by a claim to United States citizenship. We have demonstrated the error of this theory and shown that immigration officers, in determining their jurisdiction, are empowered to conduct proceedings against persons who claim to be United States citizens and to pass on their citizenship claims. See pp. 68–73, *supra*. Since that is so, there is no basis for abridging their authority by holding them helpless to implement it through arrest, detention or other reasonably appropriate measures. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 285;[46] *Hernandez-Avila* v. *Boyd*, 294 F. 2d 373 (C.A. 9); *Pan American World Airways* v. *United States*, 122 F. Supp. 682, 685–686 (Ct. Cl.); *In re Wing*, 124 F. Supp. 492, 494.

Petitioner also complains about the length of his detention. But the record demonstrates that the Attorney General moved expeditiously and that any delay was caused by petitioner's actions (R. 27a) and by the time inevitably required for hearing, decision, and appeal. As we have noted, the authority to require reasonable detention pending determination of deportability is exercised under Section 242(a) of the

[46] In *Ng Fung Ho* v. *White*, *supra*, the court refused to discharge from custody citizenship claimants held under a deportation order, even though the case was remanded for a *de novo* judicial hearing of their citizenship claims.

Immigration and Nationality Act, 8 U.S.C. 1252(a) and was ratified by *Wong Wing* v. *United States*, 163 U.S. 228, 235, and *Carlson* v. *Landon*, 342 U.S. 524. The terms of the statute itself and an obvious avenue for judicial redress would have enabled him to seek release through habeas corpus if the detention was unreasonably prolonged. As stated above, he did challenge the detention but failed to appeal an adverse decision upholding it.

We have analyzed petitioner's arguments carefully in order to present a complete picture. However, we believe the contentions dealing with the arrest are not relevant to the disposition of the petition in its present posture. The issue no longer is whether petitioner should be detained pending final determination of his status. The matter is now before this Court for final disposition. If petitioner prevails on the merits the detention will end.[47] If he fails, his status as an alien subject to deportation will be ratified and the propriety of his arrest or detention pending the determination of his deportability will have become moot.[48] As Mr. Justice Brandeis observed in *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 158,

[47] As we have noted, petitioner has been free on $1000 bail pending final determination of the judicial proceedings.

[48] If the deportation order against him is upheld petitioner would be subject to detention for six months after the final court order, for the purpose of accomplishing the deportation, and to limited supervision thereafter. Section 242(c), Immigration and Nationality Act, 8 U.S.C. 1252(c). Such detention and supervision would depend on different considerations and it is premature, at this stage of the case, to consider the extent to which such measures should be applied against petitioner. See *United States* v. *Witkovich*, 353 U.S. 194.

in rejecting a similar assertion that there was no probable cause for an arrest in deportation proceedings:

> Irregularities on the part of the Government official prior to, or in connection with, the arrest would not necessarily invalidate later proceedings in all respects conformable to law.

Defects in the arrest and detention might of course have a bearing on the admissibility of any evidence resulting from such arrest and detention. *Mallory* v. *United States*, 354 U.S. 449. But the only evidence here which might be subject to such an infirmity would be petitioner's statement to the officers who interrogated and later arrested him (R. 306b). However, as we have noted, both the special inquiry officer and the district court stated that they were excluding this statement from their consideration. R. 363b; 203 F. Supp. at 392. See also page 29, note 11, *supra*. Petitioner's alienage and deportability are abundantly established by other evidence, adduced at the deportation hearing, in the form of documents and oral testimony by petitioner and others.

V

DEPORTATION WAS PROPERLY ORDERED ON SUBSTANTIAL EVIDENCE THAT PETITIONER IS AN ALIEN WHO ENTERED THE UNITED STATES ILLEGALLY

This case originated as a habeas corpus review of a deportation order. In the habeas corpus proceeding, petitioner was entitled to, and received, a *de novo* determination on his claim to United States citizenship. The courts below found that he had lost his United

States citizenship and we have supported that finding in the preceding discussion. If we are correct in our view that petitioner no longer is a citizen of the United States, it becomes necessary, finally, to appraise his assault on the deportation order.

Deportability is premised on Section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1251 (a)(1), which commands the expulsion of any alien in the United States who—

> at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

Proof of deportability must therefore embrace three elements:—alienage, entry, and excludability at the time of such entry. The first presents no problem. A finding that petitioner has lost his citizenship would be conclusive; an alien, by definition, is "any person not a citizen or national of the United States". Section 101(a)(3), Immigration and Nationality Act, 8 U.S.C. 1101(a)(3).

There is no dispute as to the facts underlying petitioner's last entry. He left the United States voluntarily in January, 1959, remained in Cuba, while serving in the Rebel Army of Cuba, until May, 1960 and reentered the United States at El Paso, Texas in July, 1960. Since "any coming of an alien into the United States, from a foreign port or place" is an entry under Section 101(a)(13) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(13), and since this was not the brief or casual type of absence considered in *Rosenberg* v. *Fleuti*, 374 U.S. 449, peti-

tioner's 1960 return to the United States manifestly was an entry for the purposes of this statute.

There remains the question whether, at the time of his 1960 entry, petitioner was excludable. The order of deportation recited two grounds: (1) that he was excludable because not in possession of an immigrant visa or equivalent document; (2) that he was excludable because of prior conviction for carnal abuse and knowledge, a crime involving turpitude. The court of appeals endorsed deportability on the first ground, and did not reach the second. In our view, deportability on the first charge is clearly established, and we likewise deem it unnecessary to discuss the second, although we believe it too is substantiated.[49]

At the time of his 1960 entry, petitioner sought to remain in this country permanently. Consequently he was an immigrant, under the explicit statutory declaration that an immigrant "means every alien except" specified classes of nonimmigrants, not relevant here. Sec. 101(a)(15) Immigration and Nationality Act, 8 U.S.C. 1101(a)(15).[50] As an im-

[49] The conviction for carnal abuse and knowledge occurred in the United States in 1951, when petitioner concededly was still a citizen of the United States. Petitioner argues that he cannot be deported for an offense committed while he was a citizen. The issue presented by this contention resembles that in *Costello* v. *INS*, No. 83, this Term. However, the ruling in *Costello* does not settle this issue, since this case presents the added feature of excludability for prior crime of an alien who seeks to enter the United States under a statute which bars aliens who "have been convicted" of a crime involving moral turpitude. Section 212(a)(9), Immigration and Nationality Act, 8 U.S.C. 1182(a)(9).

[50] Moreover, under Sec. 214 of the Immigration and Nationality Act, 8 U.S.C. 1184, every alien is presumed to be an im-

migrant he was subject to the injunction of Section 211(a) of the Immigration and Nationality Act, 8 U.S.C. 1181(a) that:

> No immigrant shall be admitted into the United States unless at the time of application for admission he (1) has a valid unexpired immigrant visa * * *.

A similar prohibition against the entry of an immigrant not in possession of an immigrant visa, or an equivalent document, is set forth in Section 212(a)(20) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(20). Section 211(b), 8 U.S.C. 1181(b), gives the Attorney General discretionary authority to waive this documentary requirement for returning lawful residents, but no such waiver was solicited or granted.

Petitioner concededly entered the United States in 1960 without an immigrant visa or an equivalent document. Since he was then excludable, he is now amenable to deportation.

Petitioner urges that he could not be expected to apply for documents as an immigrant while he claimed to be a citizen. This argument (Pet. Br. 69–70) relies on unsound premises and inappositate authorities. *Matter of W—*, 5 I & N Dec. 759, cited by petitioner, involved an entry by one who was then a naturalized citizen (although subsequently denaturalized) and held that since he was clothed with citizenship status he could not then have been expected to apply for documents as an alien. See, also, *United States ex*

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migrant, unless he has established nonimmigrant status to the satisfaction of an American consular officer overesas.

rel. Brancato v. *Lehmann*, 239 F. 2d 663 (C.A. 6). The situation is quite different here since petitioner previously had lost his American citizenship (as he had been informed) and was an alien at the time of his entry. *Podea* v. *Acheson*, 179 F. 2d 306 (C.A. 2) was a declaratory judgment suit in which the court ruled that military service did not result in expatriation because performed under duress. The court found also that a Rumanian passport had been obtained because the State Department erroneously had refused an American passport. There is no such duress or error here.

Petitioner suggests (Pet. Br. 70) that these holdings are relevant since his expatriation had not been established and he could not have solicited entry documents without conceding his expatriation. The argument is erroneous, for a number of reasons. In the first place, as we have shown (pp. 61, *supra*, *et seq.*), his citizenship had been lost when he performed the act of expatriation. Moreover, there are no overtones of misinformation or misapprehension here, since he was aware of the State Department's view that he had lost his American citizenship, after service of the certificate of loss of nationality in February, 1960.[51] Petitioner made a press statement that he would fight for his American citizenship but did nothing else. It is not true that he had no remedies. He could have asked the State Department to reconsider its action,

[51] As we have noted (pp. 62-63, *supra*) this certificate did not itself cause loss of nationality but merely noted that such loss had occurred. Its function was to notify the party and the interested agencies of our Government that loss of nationality apparently had occurred. It had no binding effect in subsequent consideration of citizenship status.

but did not do so. We have shown (p. 66, *supra*) that he also could have applied to our diplomatic or consular officials then in Cuba for a certificate of identity which would have enabled him to come to the United States to press his citizenship claim,[52] and that he could have sought judicial aid through a declaratory judgment suit in the courts of this country, even though he still continued to reside in Cuba. *Rusk* v. *Cort*, 369 U.S. 367. Moreover, he could have applied for a visa to come to this country. The procurement of such a visa would not have surrendered his citizenship claim, and hardly would have precluded him from urging his citizenship claim in the courts. See, *e.g.*, *Perez* v. *Brownell*, 356 U.S. 44. And he could have brought a suit for a declaratory judgment of citizenship after he came to this country in 1960.

But petitioner did none of these things. Instead, he chose to enter this country furtively on the basis of a representation that he was a citizen, knowing that his citizenship status previously had been disputed. We can perceive in his situation no basis for relieving him from the statutory requirement for an immigrant visa, which is applicable to all aliens seeking to enter the United States.

Finally, petitioner argues that in any event no deportation order can be entered against him because he once was a citizen of the United States. One phase of this contention urges the district court's view, over-

[52] Such a certificate would have been acceptable as a travel document in lieu of a visa. See Section 360(b) and (c), Immigration and Nationality Act, 8 U.S.C. 1503(b) and (c).

ruled by the court of appeals, that petitioner was not amenable to exclusion or deportation until a court had determined that he had lost his American citizenship. We have already demonstrated the fallacy of this contention by showing that the loss of citizenship occurred automatically when the act of expatriation was committed (see pp. 61 *supra, et seq.*).

The second aspect of the argument is more sweeping and asserts that there is no power to deport a stateless, American-born expatriate. No authority is cited to buttress this hypothesis, and none can be. Its only support is said to be a dictum in the dissenting opinion of the Chief Justice in *Perez* v. *Brownell*, 356 U.S. at 65, note 6. The Chief Justice did not, of course, purport to decide this question but merely posed some doubts. His observations, as we read them, appear to be primarily directed to the expulsion of expatriates for misconduct in the United States and not to their deportation for illegal entry after they had lost their citizenship. This reading emerges more clearly upon reading the entire footnote, rather than the portion excerpted by petitioner.

We urge that petitioner cannot defeat deportation merely because he once was a citizen of the United States. It is clear enough, we believe, that the statutory directives for the exclusion and deportation of "any alien" encompass one in petitioner's situation. As we have noted, Section 101(a)(3), 8 U.S.C. 1101(a)(3) defines an alien as "any person not a citizen or national of the United States". And if cumulative evidence were needed that this explicit language includes expatriates, it can be found in the provisions, in the

current and prior statutes, giving special benefits under the immigration laws to certain categories of former citizens. *E.g.*, Section 101(a)(27) (D) and (E), Immigration and Nationality Act, 8 U.S.C. 1101(a)(27) (D) and (E).

Since the statutory design is plain, the only question raised in this connection concerns the power of Congress. An assault on the power of Congress to expel aliens who have entered illegally comes quite late in the day. And the notion that deportation constitutes punishment, in the constitutional sense, has been refuted by an unbroken line of decisions in this Court from *Fong Yue Ting v. United States,* 149 U.S. 698 to *Galvan* v. *Press,* 347 U.S. 522. See, also, *Flemming* v. *Nestor,* 363 U.S. 603, 616. We have shown that petitioner's expatriation resulted from a regulatory, rather than a punitive, measure. (See pp. 43, *supra, et seq.*). And since the mandate for the expulsion of aliens who entered illegally is general in application and manifestly regulatory in aim, we can see no reasonable basis for characterizing it as punitive in its application to petitioner, in the absence of any showing that Congress intended to inflict punishment.

In essence, petitioner's position is that a person who has lost his citizenship by actions in a foreign country has an absolute right to return to this country, without complying with the conditions prescribed by Congress for the entry of aliens. The acceptance of this argument would result in fragmentation of the power of Congress to fix the standards and conditions under which aliens may be admitted to the United States. See *Ekiu* v. *United States,* 142 U.S. 651; *The Chinese*

Exclusion Case, 130 U.S. 581. Since the deportation edict here merely effectuates the power to exclude, it is invulnerable to petitioner's challenge. See *Fong Yue Ting* v. *United States,* supra; *United States ex rel. Vajta* v. *Watkins,* 179 F. 2d 137, 139 (C.A. 2). We cannot believe that because petitioner was a former citizen he acquired immunity from deportation even though he entered the United States in violation of law.[53] Neither his former citizenship status nor his prior residence in this country exempted petitioner from compliance with the immigration laws when he sought to enter the United States. *Lem Moon Sing* v. *United States,* 158 U.S. 538, 547; *United States ex rel. Polymeris* v. *Trudell,* 284 U.S. 279; *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206, 213. As an alien who breached those laws in entering the United States he is now deportable.[54]

[53] See *Rabang* v. *Boyd,* 353 U.S. 427, 433, in which this Court upheld a deportation order against a former national of the United States, stating: "The 1931 Act plainly covers the situation of the petitioner, who was an alien, and who was convicted of a federal narcotics offense".

[54] Citing a press statement by an unnamed "spokesman" (R. 24a), petitioner contends that the deportation order cannot be executed since no country would accept him. This contention is irrelevant to the determination of his deportability. Under the procedure in effect when his hearing was conducted, the place of deportation was not fixed during the deportation hearing, and its selection was postponed until deportability was finally determined. See *Foti* v. *INS,* 375 U.S. 217, 230, note 16. Therefore, there has as yet been no consideration of the place of deportation. When that occurs, petitioner will have an opportunity to designate his destination and to claim that he would be physically persecuted in one selected by the Government. Section 243 (a) and (h), Immigration and Nationality Act, 8 U.S.C. 1253 (a) and (h). And even if no other

CONCLUSION

Petitioner lost his United States citizenship by serving in the armed forces of Cuba. At the time he entered the United States in 1960 he did not comply with the statutory requirements for the entry of aliens, and his entry was unlawful. Consequently the order of deportation was valid and the judgment of the court of appeals directing dismissal of the writ of habeas corpus should be affirmed.

Respectfully submitted.

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MARCH, 1964.

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country were willing to receive him, he would be subject to additional sanctions while he remained in this country. See *United States* v. *Witkovich*, 353 U.S. 194.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 253

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,

Petitioner,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1963

No. 253

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,

Petitioner,

against

P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITIONER'S REPLY BRIEF

This reply brief is submitted by the petitioner pursuant to the permission granted by the Chief Justice at the oral argument to file such a brief within five days.

I

§ 349(a)(3) as here applied constitutes punishment.

The application of § 349(a)(3) to Marks has, for him, the following consequences:

1. He was arrested and detained in maximum security at the Federal Detention Headquarters for almost nine months solely for the alleged purpose of assuring his availability for deportation (see Pet. Br., pp. 8-10), although it was acknowledged by the respondent upon the oral argument before this Court that there is no country willing to

accept the petitioner as a deportee and therefore no place to which he can now be deported.

2. According to the determinations here under review, Marks has lost his American citizenship and, having acquired no other, he is stateless. If his status remains unchanged, Marks can be deported at any time to any country willing to accept him unless in the opinion of the Attorney General deportation to such a country would subject Marks "to physical persecution". Immigration and Nationality Act of 1952 (hereinafter referred to as "Act of 1952"), § 243(h); 8 U. S. C. A. § 1253(h).

3. Once judicial review of the final order of deportation is completed, the Attorney General may, in his discretion, detain Marks for a period of six months while undertaking to make further efforts to effect Marks' "departure from the United States". Act of 1952, § 242(c); 8 U. S. C. A. § 1252(c). And if Marks' deportation is not effected in that period of time, the statute provides that he "shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section" (*ibid*).

4. Once deported, Marks cannot return to this country except with the Attorney General's consent. Act of 1952, § 212(a)(17); 8 U. S. C. A. § 1182(a)(17).

5. If, on the other hand, Marks is never deported, he will remain an alien at all times subject to "supervision" and risk of detention, as indicated, and ineligible for naturalization unless, after seven years and a showing by Marks of "good moral character" during that seven years, the Attorney General "in his discretion", and subject to review by the Senate and House of Representatives, suspends deportation and adjusts Marks' status to that of an alien lawfully admitted for permanent residence. Act of 1952, § 244; 8 U. S. C. A. § 1254.

The deplorable and unprecedented status of Marks as the result of the application of § 349(a)(3) to him is said by the respondent to be the unfortunate but merely incidental consequence of the regulatory objective of § 349(a)(3) and, therefore, non-punitive for constitutional purposes. *Perez* v. *Brownell*, 356 U. S. 44, which did not involve statelessness, is cited by respondent for the proposition that Marks' citizenship is being terminated only to terminate the foreign affairs problems actually or potentially created by petitioner's citizenship, not to punish Marks. *Trop* v. *Dulles*, 356 U. S. 86, and *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, — which did involve statelessness and held the imposition of such a condition to be punishment—are said by respondent to be distinguishable because of a discernible legislative intent in those cases to punish, not merely regulate.

As will be seen at pp. 5-10, *infra*, the congressional purpose to impose loss of citizenship for an imagined lack of American allegiance underlies § 349(a)(3) just as it underlies § 349(a)(8) invalidated in *Trop* and § 349(a)(10) invalidated in *Mendoza*. Deprivation of citizenship for acts indicating disloyalty, such as the desertion involved in *Trop* [§ 349(a)(8)], the draft evasion involved in *Mendoza* [§ 349(a)(10)], and the foreign military service involved here [§ 349(a)(3)], not regulation of our foreign affairs is the evident congressional intent in this body of legislation. And when the result of such denationalization is statelessness, then the finding of punishment in *Trop* and *Mendoza* is applicable.

The facile formula that termination of citizenship to terminate problems created by such citizenship is regulatory merely and therefore non-punitive cannot serve to avoid the punitive nature and quality of the imposition of the terrifying condition of statelessness. Liquidating Marks physically would likewise liquidate the actual or potential problems purportedly created by him; but no such formula-

tion of a death penalty makes it any less a penalty. Similarly, incarceration of any criminal *pro tanto* terminates the problems he creates for society by terminating his liberty; his loss of freedom is no less a criminal penalty because of the "regulatory" purpose served by his imprisonment.

This Court observed in *Mendoza, supra*, at p. 168, n. 23, that

> "* * * forfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment."

The UN Secretariat's analysis of statelessness, entitled "A Study of Statelessness" (1949), p. 140, likewise points out that instances

> "* * * of individual forfeiture of nationality as a penalty are frequent and vary from country to country. In such cases, the State accuses one of its nationals of committing an act or adopting an attitude contrary to its interests.
>
> "The main grounds for deprivation of nationality as a penalty are ascertained to be the following:
>
> "(a) Entry into the service of a foreign government, more particularly, enrollment in the armed forces of a foreign country * * *"

Borchard's monumental "Diplomatic Protection of Citizens Abroad" also characterizes expatriation for foreign military service as a penalty (p. 687). The facility with which any punishment can be rationalized as a regulation, thereby circumventing constitutional safeguards applicable to punishment, warns against the efforts here to transmute involuntary statelessness into something other or less than the kind of devastating penalty which can be imposed by government only after full compliance with the provisions of the Fifth, Sixth, and Eighth Amendments.

II

The legislative history of § 349(a)(3) demonstrates no congressional purpose to regulate foreign affairs. § 349(a)(3) was enacted and serves only to denationalize American citizens thought by the Congress to lack American allegiance. Since foreign military service is not conclusively or even reasonably demonstrative of a renunciation or lack of American citizenship or allegiance, § 349(a)(3) is unconstitutional.

The statutory context of § 349(a)(3) is a body of legislation expatriating for repudiation or lack of allegiance to the United States. The other portions of § 349(a) denationalize for foreign naturalization [§ 349(a)(1)], taking a foreign oath of allegiance [§ 349(a)(2)], service in a foreign government [§ 349(a)(4)], voting in a foreign political election [§ 349(a)(5)], formal renunciation of American nationality [§ 349(a)(6), (7)], desertion [§ 349(a)(8)], treason or sedition [§ 349(a)(9)], and draft evasion [§ 349(a)(10)]. The common denominator of all the provisions of § 349(a) is, therefore, presumed disloyalty or disaffection on the part of American citizens. But since it is evident that no such disloyalty or repudiation of American allegiance or citizenship can be irrefutably presumed from the single circumstance of foreign military service (see Pet. Br., 29-31, 37; see also pp. 6-8, *infra*)—particularly in the absence of any requirement in § 349(a)(3) of an intent incompatible with American allegiance (see dissent of Stewart and White, JJ., in *Mendoza*, *supra*, at pp. 213 ff.)—the respondent expends much energy to demonstrate that § 349(a)(3) is an exercise of the foreign affairs power as § 349(a)(5) was found to be in *Perez*. While reference to the legislative history of § 349(a)(5) in *Perez* could support some such hypothesis in the case of § 349(a)(5), no comparable reading of the history of § 349(a)(3) is possible.

Voluntary expatriation for any purpose, including foreign military service, was not known at common law. 3 Moore, International Law Digest, p. 552; Tsiang, The Question of Expatriation in America Prior to 1907, pp. 11-24. During our Revolutionary War, and again during our Civil War, military service in the American armed forces by aliens such as the Marquis de la Fayette was not considered by this country to result in loss of foreign citizenship. *Talbott* v. *Jansen*, 3 Dall. 133, 164; 3 Moore, *supra*, at pp. 733-734. Prior to the first statutory declaration in the Act of 1868, 15 Stat. 223, of the right of Americans to voluntary expatriation, Congress refused on several occasions to adopt legislation dealing with denationalization for foreign military service. See Morrow, The Early American Attitude Toward the Doctrine of Expatriation, 26 Am. J. Int'l Law 552, 555-556 (1932); Roche, Loss of American Nationality: The Years of Confusion, 4 West. Pol. Q. 268, 274-277 (1951). It was, likewise, the general tendency of the early decisions to deny an expatriating effect to foreign military service. See, *e.g.*, *Talbott* v. *Jansen*, *supra*; *The Santissima Trinidad*, 7 Wheat. 283; *McIlvaine* v. *Coxe's Lessee*, 4 Cranch 209; see also Tsiang, *op. cit. supra*, at pp. 29-34, 61-68.

The Act of 1868 allowed voluntary expatriation, but did not specify the acts constituting such expatriation. In the administration of that Act, the manner and occasions of renunciation of American citizenship were determined by the State Department. The consistent interpretation adopted under the Act of 1868 was that foreign military service by a native born American without an oath of allegiance to the foreign state did not constitute the expatriating action authorized by that Act; the consequence attributed to such service was the withdrawal of diplomatic protection, not the withdrawal of citizenship. H. R. Doc. 326, 59th Cong. 2nd Sess. (1907), pp. 163-164; Borchard, *op. cit. supra*, pp. 711, 730, 766-776; 3 Moore, *op. cit. supra*, pp. 730-735; Tsiang, *op. cit. supra*, pp. 98-103. This

mode of treatment of foreign military service was codified in the Act of 1907, 34 Stat. 1228, and as late as 1916 one commentator wrote that:

> "It has been held almost uniformly that entrance into the military service of a foreign government, unless accompanied by an unqualified oath of allegiance, does not effect expatriation." (Borchard, *op. cit. supra*, at p. 711.)

The denationalization provisions of the Nationality Act of 1940, 54 Stat. 1137, were premised on the stated prevalent purpose to take citizenship from those who had transferred allegiance from this country to another. See Pet. Br., pp. 20-21. In this sense the Act of 1940 may be properly "regarded primarily as a codification" of the experience under the Acts of 1868 and 1907. *Perez, supra*, at p. 56. § 401(c) of the 1940 Act substantially codified the manner in which foreign military service had previously been handled by providing that such service was denationalizing where the soldier had or acquired the citizenship of the foreign state being served. In this fashion the Congress continued to manifest its understanding that denationalization for foreign military service involved an inquiry into the actor's intention to repudiate his American allegiance by such service and that such intention could not be conclusively presumed from such service in the absence of the acquisition of a foreign allegiance in conjunction with the foreign military service.[1] Roche, the Expatriation Cases, Supreme Court Review (1963), 325, at pp. 332-333. Indeed, the recent death of General of the

[1] To the extent that § 401(c) and § 349(a)(3) were also addressed to the purpose of avoiding conflicting claims of sovereignty in cases of dual nationals serving unwillingly in foreign armies, *Nishikawa* v. *Dulles*, 356 U. S. 129, has negated that purpose. (See Pet. Br., pp. 22-23.) Only voluntary foreign military service is potentially denationalizing, and those serving voluntarily are not likely to invoke American intervention to avoid such service and thereby provoke conflicting claims of sovereignty.

Army Douglas MacArthur recalls that at the time of the passage of § 401(c) he was a retired United States officer serving as Field Marshal in the armed forces of the Commonwealth of the Philippines at a fixed compensation.

We have already shown that the language of § 349(a)(3), which dispenses with the need for an oath of foreign allegiance or the possession or acquisition of foreign citizenship as a predicate for expatriation for foreign military service, resulted from the authoritatively expressed view of the Senate Judiciary Committee that denationalization for such service should not be dependent upon whether the foreign state being served makes citizenship in or an oath of allegiance to that state a condition of military service. Pet. Br., pp. 21-22. The explicit purpose for casting 349(a)(3) in its present form was to equate those who did not with those who did take an oath of allegiance upon entering a foreign army[2]. Sen. Rep. No. 5151, 81st Cong., 2nd Sess., p. 749. When this expression of purpose is considered against the history of 84 years following the Act of 1868, in which foreign military service in conjunction with a foreign oath of allegiance was deemed renunciatory of American nationality, it becomes clear that § 349(a)(3) involves expatriation for a supposed loss or transfer of

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[2] § 349(a)(3) also added the provision that foreign military service would not be denationalizing if preceded by specific written authorization by the Secretaries of State and Defense. This provision was, no doubt, influenced by the prior practice of the State Department under the Acts of 1868 and 1907 in interpreting the kinds of foreign military service which could be deemed renunciatory of American citizenship. There is no indication in any of the hearings, debates, or reports that this provision reflects, as respondent claims, "a keen awareness of * * * foreign policy implications" (Resp. Br., p. 37). Since the mentioned provision would appear to vest unlimited and undefined administrative discretion to determine matters affecting fundamental personal rights, it gives rise to grave constitutional questions not raised or considered by *Perez*. See, *e.g.*, *Kunz* v. *New York*, 340 U. S. 290; *Largent* v. *Texas*, 318 U. S. 418; *Lovell* v. *Griffin*, 303 U. S. 444.

allegiance. Roche, *op. cit. supra*, at p. 332; Note, 54 Columbia Law Rev. 932, 942. For what Congress was saying when it enacted § 349 (a)(3) was that all foreign military service has the same expatriation significance as the foreign military service conjoined with a foreign oath of allegiance which, for almost a century, had been treated as a voluntary renunciation of American nationality. The legislative history of § 349 (a)(3) leaves no doubt, therefore, of the statute's sole and integral connection with matters of allegiance.

There is not a single authority cited by respondent,—or found in our research,—to support the respondent's suggestion that § 349 (a)(3), for any purpose here relevant, was directed at or intended to deal with matters coming within the scope of the power of the Congress in the area of foreign affairs. The commentaries referred to at page 54, Resp. Br., deal with the problems which were presented by naturalized Americans of dual nationality conscripted into armed forces of their native lands. These problems were largely resolved by the series of Bancroft treaties starting in 1868 discussed at pp. 27-28, 46. Resp. Br., *Schneider* v. *Rusk*, No. 368, Oct. Term 1963, and by the provisions of § 352 (a) of the 1952 Act [8 U. S. C. A. § 1484 (a)] for the denationalization of dual nationals who reside abroad. To the extent that the mentioned problems were not so resolved, the decision of this Court in *Nishikawa*, *supra*, has effectively demonstrated that § 349 (a)(3) cannot play any significant role in the field of dual nationals conscripted abroad.

Consequently the entire "foreign affairs" argument of respondent is one inspired by *Perez* but otherwise unsubstantiated, *i.e.*, that § 349 (a)(3) is an effort by the Congress to avoid the "embarrassment" which may be caused the United States by the foreign military service of one of its nationals. Unlike the legislative history of § 349 (a)(5) reviewed in *Perez*, not a single word is to be found in the legislative history of § 349 (a)(3) to support the "embar-

rassment" theory of constitutional power to expatriate for foreign military service. Our historic policy of withholding diplomatic protection from American nationals serving in foreign armies (including revolutionary forces) seems to have been so adequate in handling any such potential "embarrassment" (see pp. 6-8, *supra*) that it never occurred to anyone in or before the Congress or any of its committees to enlist any additional remedies. Unless imagination is to supply that which the Congress never proposed, provided, or intended, § 349 (a)(3) does not involve the exercise of the Congress of its powers in the conduct of the foreign affairs of the nation and cannot be constitutionally justified by any reference to those powers. In statutory and historical context, § 349 (a)(3), as the rest of § 349 (a), is directed at expatriating those American nationals the Congress believed to have demonstrated a transfer or a lack of allegiance to this country, and since that belief of the Congress has been expressed in effect as an irrebuttable presumption, § 349 (a)(3) is unconstitutional.

III

§ 349(a)(3) is not a reasonable means of effectuating any foreign affairs function which may be intended to be served by § 349(a)(3).

The majority in *Perez*, as well as the concurring opinions of Mr. Justice Brennan in *Trop* and *Mendoza*, require that the use of expatriation as a regulatory device can be constitutionally justified only if it fairly and reasonably effectuates the objective said to be involved. Here the object of § 349(a)(3) is said by the respondent to be the avoidance of "embarrassment" in the conduct of our foreign affairs, and expatriation is said by the respondent to be the only "effective means to cope with a citizen who participates in foreign military ventures" (Resp. Br., p. 60). Respondent cannot and does not point to anyone

in Congress who ever said so, and we are referred to no other authority in or out of Congress who joins in this view of the necessity of § 349(a)(3) to accomplish by expatriation what has historically been successfully accomplished by the withholding of diplomatic protection (see pp. 6-8, *supra*). The demonstrated availability of a technique amply sufficient to serve the purpose attributed by respondent to § 349(a)(3), without the destruction of nationality and resultant statelessness, constitutionally forecloses the utilization of § 349(a)(3). *Schneider v. State*, 308 U. S. 147, 162; *Dean Milk Co. v. City of Madison*, 340 U. S. 349 [9].

The experience of other nations in the treatment of foreign military service by their nationals is instructive. Not one major democracy in the world other than the United States automatically expatriates native born citizens for foreign military service without an opportunity to retire from such service on demand within a fixed period of time. See United Nations Legislative Series, Laws Concerning Nationality, ST LEG SER. B/4 (1954) and Supplement, ST LEG SER. B/9 (1959); see also Borchard, *op. cit. supra*, at p. 687 [10]. Plainly § 349(a)(3) cannot be sustained as a necessary or even a reasonably appropriate means to solve the alleged problem of potential "embarrassment" of our nation in the conduct of its foreign affairs: the insufficiency of the nexus between expatriation for

[9] § 349(a)(3), purportedly devoted to eliminating international tensions, as interpreted by respondent would give rise to perplexing international problems relating to the obligation of the United States to accept as a deportee native-born Americans expatriated and stateless under § 349(a)(3) but expelled by a foreign country.

[10] The respondent acknowledges that only Austria, Cuba, Germany, Indonesia, Iraq, Italy, Jordan, and Turkey have laws which "resemble" § 349(a)(3). Resp. Br., p. 60, n. 39. Germany, Iraq, Italy and Jordan, however, denationalize only after a failure to comply with a demand to discontinue military service. See Laws concerning Nationality, *supra*, at pp. 183, 243, 268, 269, 275, [illegible]

foreign military service and the foreign affairs power is not the result of any congressional ineptitude but only another confirmation that § 349(a)(3) was enacted to deal with expatriation for presumed repudiation of allegiance, not with the non-existent problem of national responsibility for the act of an individual serving in a foreign military force.

IV

Marks did not voluntarily serve in the Armed Forces of a foreign state within the meaning of § 349(a)(3).

The extensive discussion under this heading at pp. 43-68, Pet. Br., anticipates and meets virtually all respondent's arguments on the issue and requires no repetition at this point. Some of the respondent's more egregious errors concerning the record must, however, be cited.

We have pointed out that after the fall of Batista, the Rebel Army (or the Revolutionary Forces) did not wage war or train or prepare to wage war, but engaged, rather, in police, security, and civic functions. The Rebel Army in which Marks served after January, 1959 did not, therefore, have the distinctive characteristics of the armed forces of a foreign state as those terms are used in § 349 (a)(3). Those functions appear to have been taken over after January, 1959 by the state militia.

To meet this state of facts respondent states that:

> "petitioner and his colleagues in the Cuban Rebel Army bore arms, which were used for * * * training"

(Resp. Br., p. 19), although no such evidence is in the record. The Rebel Army is said by the respondent to have, after January 1959, "controlled the weapons, forts and military personnel" (Resp. Br., p. 21) without any supporting record reference. Law No. 600, which contem-

plated the integration of the Rebel Army into a newly formed Revolutionary Armed Forces (R. 271a), is incorrectly characterized as confirming "the dominance of the Rebel Army in the nation's armed forces after January 1, 1959" (Resp. Br., p. 23). According to respondent, "a large part of the Rebel Army remained in its quarters and was not involved in * * * civic functions" (Resp. Br., p. 27), but the record reference cited (R. 201a) fails to support the quoted text. Use is made by respondent (see Resp. Br., p. 29) of a statement made by petitioner to Immigration Service investigators under circumstances which made that statement so clearly inadmissible and so suspect (see Pet. Br., pp. 38-39) that neither the Service nor either of the courts below referred to or relied upon that statement in their determinations.

V

Marks is, in any event, not deportable.

A native-born American, made an alien because he is expatriated against his will, may not be deported. The power to deport is derived from the power to protect against unwanted immigration of foreign-born into this country. Deportation "is but a method of enforcing the return to his own country of an alien." *Fong Yue Ting* v. *United States*, 149 U. S. 698, 730. The statutory definition of the places to which an alien can be deported evidences the congressional understanding that deportation contemplates an alien's return to his native land. See Act of 1952, § 243; 8 U. S. C. A. § 1253. Only the prospect of return to, rather than banishment from a homeland could possibly justify the plenary powers to expel and deport assumed by the Congress and sustained by this Court. In the absence of any express legislative assertion of the power to deport and banish a native-born with no other nationality, an intent to exercise such power should not be

implied. See *Perez*, *supra*, *at* p. 65 n. 6; see also *Worthy* v. *United States*, 32 USLW 2440 (C. A. 5, 1964).

In any event, *Costello* v. *I & NS*, 32 USLW 4130, disposes of both grounds relied upon by the Service here to sustain Marks' deportability.

1.

This Court held in *Costello* that conviction for a crime involving moral turpitude could not sustain an order of deportation under a statute which authorizes the deportation of an alien convicted of such a crime where the alien was a naturalized citizen when so convicted. Marks was a citizen when convicted in 1952 of the crime for which respondent now seeks to deport Marks. Under *Costello*, the petitioner here cannot be deported for his conviction of a crime at a time when his citizenship was intact.

2.

The Court below here held, and respondent argues that since Marks was "automatically" denationalized by his foreign military servic after January, 1959,[5] he was an alien when he returned to the United States in July, 1960 and excludable and therefore deportable for his failure to possess the entry documents required of an alien. In *Costello* it was similarly contended that Costello's denaturalization following his conviction was, by operation of law [Act of 1952, § 340(a); 8 U. S. C. A. § 1451(a)], expressly made retroactive to the date of naturalization so that Costello was an alien when convicted and therefore deportable. This contention was rejected for the reason that the statute providing for such retroactivity was not made explicitly applicable by the Congress to deportation. Here any relation-back application of denationalization

[5] It is not clear exactly at which moment during the period of that service between January 1959 and May, 1960 it is claimed by the Court below or the respondent that Marks lost his American citizenship.

under § 349(a)(3) can only be implied from the purpose of § 349(a)(3) since there is no retroactivity provided for by the statute.[6] Accordingly, even if § 349(a)(3) can be construed as automatically terminating an American's citizenship upon his entering into foreign military service for the purpose of terminating the problem created by his American citizenship, it does not follow that termination of such citizenship is retroactive for deportation purposes. For *Costello* establishes that denationalization cannot be deemed retroactive in order to sustain deportation unless expressly so provided by statute and there is here no such statutory provision. Petitioner's acknowledged right to test out judicially and *de novo* the controverted issues of fact and law determinative of his citizenship status under § 349(a)(3), make it particularly appropriate that any retroactive effect of § 349(a)(3) should be confined to fixing the time of his denationalization *vis-a-vis* the political and diplomatic responsibilities of the United States and should not be extended to fix the time of his denationalization for purposes of determining his deportability.

The impracticality of requiring entry documents of someone in Marks' status as of July 1960 confirms the propriety of the ruling of the District Court here that he was not deportable for failure to procure such documents. Visas are issued in contemplation of applicant who is an alien. See Act of 1952, §§ 221, 222; 8 U. S. C. A. §§ 1201,

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[6] The Court of Appeals held here that § 350 of the 1952 Act, 8 U. S. C. A. § 1488, had the effect of making § 349(a)(3) retroactive by dint of the provision in § 350 that loss of nationality "shall result solely from the performance" of the prescribed denationalizing acts. We have already indicated this reading of § 350 is inconsistent with language of this Court in *Kawakita v. United States*, 343 U. S. 717, 730-731. See Pet. Br., p. 71. Moreover, since various subdivisions of § 349 plainly require intervening time [see, *e.g.*, § 349(a)(10)] or action [see, *e.g.*, §§ 349(a)(7), (8), (9)] between the denationalizing conduct and denationalization, § 350, which applies to all of § 349, cannot intend to provide for denationalization immediately upon the occurrence of the denationalizing conduct.

1202. The petitioner would have risked "a concession of serious if not fatal character" if he had sought and obtained a visa, assuming that one would have been issued and he could have completed the form outlined by the applicable statutes. *Podea* v. *United States*, 179 F. 2d 306, 309 (C. A. 2). Similarly, if Marks had applied for a certificate of identity pursuant to the Act of 1952, § 360(b) [8 U. S. C. A. § 1503(b)], as now suggested by respondent, Marks would have been entitled only to travel to a port of entry there to be subject to "proceedings involving aliens seeking admission to the United States." Act of 1952, § 360(c); 8 U. S. C. A. § 1503(c). In any resultant exclusion proceeding, as distinct from the instant deportation proceeding, the petitioner would not have been entitled to resist being sent to Cuba or any other country where he was subject to physical persecution. *Leng May Ma* v. *Barber*, 357 U. S. 185; *Rogers* v. *Quan*, 357 U. S. 193.

CONCLUSION

The judgment below should be reversed and the writ of habeas corpus prayed for should issue.

Respectfully submitted,

MURRAY A. GORDON,
Attorney for Petitioner.

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IN THE

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UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,

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P. A. ESPERDY, as District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

October Term, 1963

No. 253

UNITED STATES OF AMERICA, *ex rel.*
HERMAN FREDERICK MARKS,

Petitioner,

against

P. A. ESPERDY, a District Director of the Immigration and Naturalization Service, New York District, United States Department of Justice,

Respondent.

PETITION FOR REHEARING

Petitioner presents his petition for a rehearing of the above-entitled cause, and, in support thereof, respectfully shows:

The United States Court of Appeals for the Second Circuit held in this habeas corpus proceeding that the petitioner had lost his native-born American citizenship pursuant to § 349 (a)(3) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. 1481(a)(3)] and was a deportable alien by reason of service in the armed forces of a foreign state. 315 F. 2d 673. This Court granted certiorari. 375 U. S. 810. Argument in *Schneider* v. *Rusk*, No. 368, Oct. Term, 1963, involving the constitutionality of § 352 (a)(1) of the Immigration and Nationality Act of 1952 [8 U.S.C.A. 1484 (a)(1)], was set for argument immediately after argument in *Marks*. 32 U. S. L. W. 3163. On May 18, 1964, the challenge to the validity of § 352(a)(1) was sustained in *Schneider* (32 U. S. L. W. 4397), three Justices dissent-

ing and Mr. Justice Brennan taking "no part in the decision of this case" (32 U. S. L. W. 4400). That same day the judgment in *Marks* was affirmed without opinion by an equally divided Court, Mr. Justice Brennan taking "no part in the consideration or decision of this case" (32 U. S. L. W. 3399). For the reasons to be indicated the instant petition for rehearing is made and should be granted.

Grounds for Rehearing

I.

The allowance of certiorari here confirms the substantial and unresolved nature of the constitutional issues posed by this case. Affirmance by a divided Court and without opinion leaves those issues unsettled. The Court's function to decide and to state the grounds for decision in those cases which the Court deems to warrant review is frustrated by judicial deadlock, and rehearing, an otherwise rarely granted remedy, has most frequently been granted for the purpose of breaking such a deadlock. See, *e.g.*, *United States* v. *One 1936 Model Ford V-8*, 305 U. S. 564, 666; *Gray* v. *Powell*, 312 U. S. 666, 313 U. S. 596; *Toucey* v. *New York Life Ins. Co.*, 313 U. S. 538, 596; *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 313 U. S. 541, 596; *Baltimore & Ohio R. Co.* v. *Kepner*, 313 U. S. 542, 597; *New York, C. & St. L. R. Co.* v. *Frank*, 313 U. S. 588, 596; *Halliburton Co.* v. *Walker*, 326 U. S. 696, 327 U. S. 812; *Bruces Juices, Inc.* v. *American Can Co.*, 327 U. S. 758, 812; *MacGregor* v. *Westinghouse Co.*, 327 U. S. 758, 812; *Indian Towing Co.* v. *United States*, 349 U. S. 902, 926; *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, 349 U. S. 901, 926; see also Stern and Gressman, Supreme Court Practice (3 ed. 1962), pp. 386-387. Rehearing to avoid a failure of function is particularly appropriate here.

As matters now stand the issue whether Marks was constitutionally expatriated and rendered stateless has not

been the subject of conclusive independent appellate disposition. The Second Circuit here found "great force in the constitutional arguments presented by" Marks, but felt "constrained by the superior authority of *Perez* v. *Brownell*, 362 U. S. 44 * * *, to affirm the determination of alienage" (315 F. 2d, at p. 675). No other grounds were cited below in support of the validity of § 349(a)(3). It is, however, now doubtful whether *Perez* is "superior authority" on the issue of the "power of Congress to take away citizenship for activities done by the citizen * * * absent expatriation by the voluntary renunciation of nationality and allegiance" (*Schneider, supra*, 32 U. S. L. W., at p. 4399). The majority opinion in *Schneider* states that the view that such power "is non-existent * * * has not *yet* commanded a majority of the *entire* Court" (*ibid.*) (emphasis supplied), but contains no affirmative confirmation that *Perez* does now or may be expected to command a majority of the "entire" Court or even of the Court which participated in *Schneider*. The language and the ruling in *Schneider* necessarily cast great doubt on the "superior authority" of *Perez* upon which the Second Circuit here relied exclusively.

The equal division of this Court leaves standing the decision below which was reached reluctantly and only by the constraint of the "superior authority" of *Perez* rendered unreliable by that equal division and by the companion decision in *Schneider*. Absent the presumed compelling authority of *Perez*, the Second Circuit would have been free to yield to the "great force in the constitutional arguments presented by" Marks, and an equal division here would have then affirmed Marks' citizenship, not his alienage. The determination here as to Marks' nationality therefore rests upon a now unsettled state of authority, and the need for resolution upon rehearing is singularly great and appropriate.

Of course, not only Marks' citizenship is here at stake. Nationality is a matter of status. And the effect of expatriating action was held by the Court below to be automatic and not dependent upon notice, charges, hearing, or judgment. Whatever may be the effect of decision or non-decision by this Court in other areas which require implementation by administrative, civil, or criminal action before the full impact of such decision or non-decision may be felt, in matters of nationality judicial deadlock can be and is here immediately and directly unsettling. Those thousands who have or will come within the various statutes which expatriate absent voluntary renunciation of nationality and allegiance [see, *e.g.*, Immigration and Naturalization Service, Annual Report (1962) 101], now cannot know whether they are or are not American citizens. To leave unsettled such a crucial and fundamental aspect of men's lives is virtually intolerable. The petitioner has strenuously argued the unconstitutionality of § 349(a)(3); significant as such conclusion may be, it does not transcend the significance of the need for some settled conclusion by this Court after rehearing and reargument on the underlying constitutional issues here raised so that citizenship status may be known.

II.

The reasons for Mr. Justice Brennan's determination to take "no part in the consideration or decision of" *Marks* and to take "no part in the decision of" *Schneider* were not given and are not known to the petitioner. The language used for such determination suggests the restraints referred to in the Act of June 25, 1948, c. 646, 62 Stat. 908, 28 U. S. C. A. 455. The petitioner is, however, unaware of the presence in *Marks* of any of the disqualifying causes mentioned in that statute. We therefore assume that such cause did obtain in *Schneider*, and

that because of certain constitutional issues common to *Schneider* and *Marks*, Judge Brennan decided not to participate in the decision of either. *Cf. Hoag* v. *New Jersey*, 356 U. S. 464, 473; *Bartkus* v. *Illinois*, 355 U. S. 281; *Ladner* v. *United States*, 355 U. S. 282.

Schneider has now been decided. Mr. Justice Brennan's participation at this time in *Marks* can no longer affect the outcome of *Schneider*. Whatever the nature of Mr. Justice Brennan's derivative disqualification in *Marks* because of *Schneider* is now eliminated. In view of the Court's equal division here, and the necessity for Mr. Justice Brennan to take part in the decision of this case, rehearing should be granted to afford him the opportunity to do so. Precisely this procedure was followed under closely analogous circumstances in *Bartkus* v. *Illinois*, 356 U. S. 969, and *Ladner* v. *United States*, 356 U. S. 969.

Hoag v. *New Jersey*, *supra*, involved review of a decision of the New Jersey Supreme Court. Mr. Justice Brennan had participated in that decision as a dissenting judge while a member of the New Jersey Supreme Court. See 21 N. J. 496, 517. He accordingly declined to take part in the case upon the review in the United States Supreme Court. He also declined to participate in the related though distinguishable contemporaneous cases of *Bartkus* v. *Illinois*, 355 U. S. 281, and *Ladner* v. *United States*, 355 U. S. 282, which were both argued on the same day with *Hoag*. The other eight members of the Court were equally divided in *Bartkus* and *Ladner* and those two cases were therefore affirmed without opinion. When *Hoag* was thereafter decided, however, motions for rehearing were granted without dissent in *Bartkus* and *Ladner* (see 356 U. S. 969), and after reargument Mr. Justice Brennan participated in the decision of both cases, writing the majority opinion in *Ladner* v. *United States*, 358 U. S. 169, with only Mr. Justice Clark dissenting (358 U. S., at pp. 179-183), and a dissenting opinion in *Bartkus* v.

Illinois, 359 U. S. 121, at pp. 164-170, as one of four dissenters.

If Mr. Justice Brennan's abstention in *Marks* is attributable to *Schneider*, it is obligatory that the instant petition for rehearing be granted so that he may now participate in *Marks* and provide the margin of resolution and settlement of the great issues raised by this proceeding. The availability of a previously non-participating Justice has been the occasion for rehearing in other deadlocked cases prior to the adoption of Rule 58 (1) of this Court (*Gray* v. *Powell*, *supra*; *Halliburton Co.* v. *Walker*, *supra*), and since then (*Indian Towing Company* v. *United States*, *supra*; *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic Steamship Corp.*, *supra*). Mr. Justice Brennan's recent declaration of "felt doubts of the correctness of *Perez*, which I joined" (*Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 187), suggests that foreclosing Justice Brennan from participating in this case may be prejudicial and not just of academic interest to the petitioner; in any event, the urgent need for decision here renders this one of those "important and difficult cases" in which rehearing will have "enhanced the deliberative process." Mr. Justice Frankfurter, dissenting, *City of Detroit* v. *Murray Corp.*, 357 U. S. 913, 915.

CONCLUSION

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that upon further consideration the judgment of the United States Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

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Counsel for Petitioner.

Of Counsel:
EDMUND ALLEN ROSNER.

Certificate of Counsel

I, MURRAY A. GORDON, Esq., counsel for the above-named petitioner do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

MURRAY A. GORDON,
Counsel for Petitioner.